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IN THE

Supreme Court of The United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the respondent municipalities "take" or otherwise unconstitutionally impair property rights in violation of the Fourteenth Amendment where

(a) the respondents induced purchasers of Washington Public Power Supply System bonds to loan funds to their public agency by expressly promising that they would repay the loan and repeatedly assuring the bondholders that they had the authority to make those commitments;

(b) the respondents presided over the irretrievable expenditure of the bondholders' loan on projects undertaken for the benefit of the respondents and their constituents;

(c) the respondents then repudiated their authority, abrogated their assurances, and refused to return any portion of the bondholders' funds after the projects failed; and

(d) the Supreme Court of Washington, in subsequently approving the actions of the respondents, redefined state law remedies and property rights in an arbitrary manner to approve the complete forfeiture of the bondholders' funds?

2. Did the Supreme Court of Washington deny due process under the Fourteenth Amendment by

(a) ruling for the first time that the authority of the municipalities turned on whether they exercised "sufficient control" over the management of the projects, treating this issue as a factual question, and then making its own findings of fact without affording any opportunity to present evidence on the issue;

(b) ruling that petitioners were not entitled to equitable relief because they had not proved "with clear, cogent and convincing evidence" they were entitled to it,

while refusing to grant a hearing at which petitioners might discharge that burden;

(c) refusing to grant any relief on the ground that the bondholders should have sought the remedy of a prior declaratory judgment, although the bondholders had no notice of any need to seek such a remedy and such a remedy would, in any event, not have been available to them; and

(d) refusing petitioner Chemical Bank's request to address whether any of the Justices of that Court should disqualify himself or herself on the ground that he or she had an appearance of a conflict of interest?

PARTIES TO THE PROCEEDINGS

Chemical Bank and the Washington Public Power Supply System were appellants below.

Respondents below were:

Public Utility District No. 1 of Benton County, Washington; Central Lincoln People's Utility District, Oregon; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County, Washington; Public Utility District No. 1 of Clark County, Washington; Clatskanie People's Utility District, Oregon; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 2 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Pend Oreille County, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 10, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Ellensburg, Washington; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town

of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port Angeles, Washington; City of Richland, Washington; City of Rupert, Idaho; City of Springfield, Oregon; City of Steilacoom, Washington; City of Sumas, Washington; City of Tacoma, Washington; Alder Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachly-Lane Electric Cooperative Association, Oregon; Central Electric Cooperative, Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Oregon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company, Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Valley Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights, Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington; Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Pavelli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salem River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington;

Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; and West Electric Cooperative, Inc., Oregon.

A list of the subsidiaries (other than wholly owned subsidiaries) and affiliates of Chemical Bank called for by Rule 28.1 is in Appendix K.* The Washington Public Power Supply System has no affiliates.

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* This and similar references are to the separately printed Appendix to this petition, containing Appendices A through K.

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PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioners Chemical Bank and the Washington Public Power Supply System respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Washington entered on December 17, 1984.

OPINIONS BELOW

The decision of the Supreme Court of Washington of which review is sought was issued November 6, 1984, is reported at 102 Wash. 2d 874 (1984), and is printed as Appendix A. The proceedings below prior to that opinion were as follows:

In an oral decision of October 15, 1982, incorporated into an unreported Order on Motions for Summary Judgment of November 16, 1982, printed as Appendix E, the Superior Court of Washington for King County granted the petitioners' motions for partial summary judgment. In an interlocutory decision filed on June 15, 1983, reported at 99 Wash. 2d 722, 666 P.2d 329 (1983), and printed as Appendix B, the Supreme Court of Washington reversed the order of the Superior Court. The Supreme Court of Washington denied petitioners' motions for reconsideration on July 22, 1983.

In an oral decision of August 9, 1983, incorporated into an unreported Order and Judgment of August 11, 1983, printed as Appendix D, the Superior Court of Washington for King County then granted respondents' motions for summary judgment or entry of judgment and dismissed petitioners' action in its entirety. In an oral decision of August 29, 1983, incorporated into an unreported Order Denying Motion For Reconsideration of Order and Judgment of September 16, 1983, printed as Appendix C, the Superior Court denied petitioners' motion for reconsideration. The November 6, 1984, decision of the Supreme Court of Washington referred to above, which affirmed the judgment of the Superior Court following petitioners' appeal, is sought to be reviewed here.

JURISDICTION

The opinion of the Supreme Court of Washington was filed on November 6, 1984. The mandate of the Supreme Court of Washington, printed as Appendix F, issued on December 17, 1984, following the denial on that date of a motion for reconsideration of a motion to intervene made by six bondholders. This Court has jurisdiction to review the judgment of the Supreme Court of Washington by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions, the texts of which are annexed to this petition in Appendix J:

—U.S. Const. art. I, § 10, cl. 1
—U.S. Const. amend. V
—U.S. Const. amend. XIV, § 1

STATEMENT OF THE CASE

Introduction

This case arises out of the largest municipal bond default in history—the default of the Washington Public Power Supply System (the "Supply System") on bonds in the principal amount of $2.25 billion and an additional $5 billion in interest. The Supply System issued the bonds at the direction, and for the benefit, of 88 municipalities, public utility districts, and rural electric cooperatives in six Northwestern states (the "participants" and respondents here), for the purpose of financing the last two of five nuclear power projects (known as Projects 4 and 5).

To persuade private parties to purchase the bonds, the participants expressly assured repayment and repeatedly told prospective purchasers that they possessed authority to give such assurances. Specifically, for each of the 14 issues of these bonds over more than four years, participants approved the necessary Supply System bond resolutions, and took no exception to the language in the Official Statements accompanying the bond offerings advising prospective purchasers that the participants were obligated to make repayment "whether or not the Projects are completed, operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output". Without those assurances, no bonds would have been sold.

The participants then supervised the irretrievable expenditure of the bondholders' funds for public purposes. However, when the projects failed, the participants repudiated their

promises, denying any obligation to return any portion of the bondholders' funds. Because the Supply System was merely the participants' instrumentality, lacking substantial assets of its own, the participants' repudiation of their obligations required the Supply System to default on the bonds.

In a decision so surprising and so unprecedented that the three dissenting Justices urged this Court to review it, the Supreme Court of Washington held that the Washington municipal participants had lacked the authority to make the unconditional commitments on which they had invited private parties to rely. The Court below relieved all of the remaining participants of any obligation and also denied every equitable or Constitutional claim made by the bondholders. The Court below thereby upheld the participants' efforts to impose the entire cost of their public projects on the bondholders. This shifted the business risk for these local public ventures from the participants, who had agreed to assume it, to mostly non-resident, private bondholders, who had been explicitly assured that they would never have to bear that risk. To reach that result, the Court below denied procedural due process by, for example, faulting the bondholders for not having previously sought a declaratory judgment remedy which had never been available, and, in a sudden, unjustified and unpredictable departure from all precedent, the Court retroactively manipulated state law so as to deny the bondholders any present remedy. As trustee for the bondholders, petitioner Chemical Bank ("Chemical"), together with petitioner Supply System, seeks review of that decision in this Court.

Background

The events preceding and precipitating the default may briefly be summarized as follows:

In the early 1970's, public utility planners in the Pacific Northwest forecast a need during the ensuing decade and beyond for substantially more electric generating capacity than had previously been built or planned. Public utilities in that

region sought to avert this power shortfall by joining in a common venture to construct five nuclear power plants. To obtain the economies of scale and risk reduction available through joint endeavor, the public utilities acted through the Supply System, a "joint operating agency" created by Washington statute, Wash. Rev. Code ch. 43.52 (1983), for the sole purpose of serving the interests of its members and participants.

The Supply System consisted of 23 Washington municipalities. Twenty of those municipalities were participants in the projects at issue here. Those twenty controlled 87% of the voting power on the Board of Directors which, throughout the sales of the bonds, was charged by Washington law with comprehensive management and control of the Supply System.[1] In addition, all of the participants in these projects were represented on a Participants' Committee, which had supervisory power over every significant action taken by the Supply System with respect to these projects, including the right to approve each bond resolution authorizing each of 14 project financings, each construction budget, and every significant contract and contract amendment.

All five projects were to be financed by debt through the sale of bonds to the public. The bonds for Projects 1, 2 and 3 were supported by the Bonneville Power Administration

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[1] 1965 Wash. Laws ch. 8, § 43.52.370, *as amended by* 1977 Wash. Laws ch. 184, § 7 (Ex. Sess.). The final sale of bonds for Projects 4 and 5 occurred on April 2, 1981. On April 28, 1981, the Washington Legislature amended § 43.52.370, *see* 1981 Wash. Laws ch. 3, § 1 (1st Ex. Sess.), *effective* July 28, 1981, to vest most of the control of a "joint operating agency" developing nuclear power plants, such as the Supply System, in an "Executive Board" consisting of four outside directors and seven regular directors. 1981 Wash. Laws ch. 3, § 2 (1st Ex. Sess.), *codified as amended at* Wash. Rev. Code § 43.52.374 (1983 & West Supp. 1985). In 1982 the Legislature again amended the statutes governing management of "joint operating agencies" to provide, among other things, for six outside directors and only five regular directors on the "Executive Board". Wash. Rev. Code § 43.52.374(1)(a), (b) (1983 & West Supp. 1985).

("BPA") through a "net billing" arrangement.[2] When that financing method became impossible because of a change in the law, payment of the bonds for Projects 4 and 5 was assured by using a technique that is common in municipal bond financing. The participants pledged—by means of "dry hole" or "take or pay" clauses in agreements between the participants and the Supply System (the "Participants' Agreements")—that they would make payments sufficient to service the bonds issued by the Supply System whether or not Projects 4 and 5 were ever completed or produced any electricity.[3] The participants' pledge was essential to any effort to market the bonds because it was the only source of assurance that the bondholders would be repaid in the event that the projects were to fail--an eventuality the participants could control, while the bondholders could not.

The need for the "dry hole" provisions arose from the participants' desire to avoid using any of their own funds to finance the projects, while reserving for themselves all of the potential benefits of the projects' expected success. Because the bondholders would not share in any "up side" potential of the projects, they did not contract to take the traditional "down side" risks of loss associated with equity or stock interests. Instead, the bondholders contracted for assurances of repayment and fixed rates of interest common to debt financings. The bondholders relied crucially on repeated and solemn assurances that the participants had the intent and authority to repay the debt of the Supply System, no matter what. Those assurances were written, unconditional, and backed by opinions

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[2] The "net billing" arrangement is described in *City of Springfield v. Washington Public Power Supply System*, 564 F. Supp. 90, 95 (D. Or. 1983), *aff'd*, Nos. 83-3927 & 83-4024 (9th Cir. Feb. 4, 1985).

[3] Such "dry hole" commitments have become a standard part of large power plant financing. Witten & Hecht, *Whoops, There Goes Washington: Is California Next?*, 15 Pac. L.J. 955, 957 n.13 (1984).

of each participant's counsel and independent bond counsel of national repute.

The bondholders were, of course, subject to the risk that the participants might become insolvent—a risk inherent in all debt securities. But the bondholders did not agree to take the risk that the participants might simply refuse to make the payments securing the bonds and that unforeseeable interpretations of state law would convert their loan into a gift.

On the strength of the participants' commitments and assurances, the bonds for Projects 4 and 5 were sold in 14 issues beginning in March 1977 and ending in April 1981, with each series of the bonds highly rated by Moody's (A-1) and Standard & Poor's (A+). But by mid-1981 serious problems had surfaced. The projected energy demand had not materialized, and there were substantial cost overruns on all five projects. All five Supply System projects, but particularly Projects 4 and 5, became a matter of intense public interest and controversy in the Northwest.

Still, the participants retained control over the destiny of Projects 4 and 5: on two occasions in 1981 the participants refused to approve plans which could have provided financing for continued construction of Projects 4 and 5, or, failing that, to ensure their orderly mothballing. Just as the participants' approvals of prior bond issues had carried the projects to that point, their disapprovals of project financing plans in 1981 spelled the projects' certain demise.

Deprived of any means of continued financing of Projects 4 and 5, the Supply System determined that it could not continue their construction. On January 22, 1982, the Supply System Board of Directors terminated those projects pursuant to the provisions of the Participants' Agreements. Under the terms of these Agreements, the participants were obligated to fund the payment of the principal and interest on the bonds.

Before the Supply System encountered serious financing difficulties, no participant had publicly questioned any participant's authority to make the required payments to retire the debt incurred on its behalf. Nor had any of the participants' ratepayers sought to contest the validity of the agreements that had enabled the participants to join in the projects for the ratepayers' benefit without advancing public funds. When it became clear that Projects 4 and 5 would fail, however, many participants abruptly reversed their prior position. They claimed that they had never possessed authority to execute the agreements on which they had induced prospective bond purchasers to rely.

The participants did not then and do not now claim to be unable to satisfy their obligation to the bondholders. They are not financially insolvent and do not claim that satisfaction of their obligation would make them insolvent. Rather, they simply declined to honor their unconditional commitments and refused to return any portion of the bondholders' funds.[4]

According to estimates prepared by or available to Chemical, there are approximately 45,000 bondholders.[5] Many more bonds were sold to individuals than to institutions: approxi-

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[4] At the time the participants were obligated to begin debt service payments under their agreements, the average cost per kilowatt-hour to them as a result of the payments was estimated by the BPA to be one-half cent, which would have been added to their estimated average retail cost of electricity of about 2.6 cents per kilowatt-hour. Based on that study, therefore, if the participants honored their obligations fully their ratepayers' average cost of electricity would have been approximately one-half the national average of about six to seven cents per kilowatt-hour and would also have been below the average rate paid by customers of investor-owned utilities in the Pacific Northwest. Lane, *No WPPSS Default—Yet*, Seattle Times, Jan. 23, 1983, at D-2; *see also* U.S. Bureau of the Census, *Statistical Abstract of the United States* (1984 ed.), at 500 (national average rate).

[5] Because the bonds are bearer bonds and the vast majority are unregistered, precise information concerning the number of bondholders, their identity, the amount of their holdings, and the like, is unavailable, necessitating the use of estimates.

mately two-thirds of the $2.25 billion principal amount of the bonds was purchased by individuals, frequently for the retirement income they were expected to provide. The bonds were issued in units of $5,000; the average holding by families or individuals has been estimated to be $15,000.

Proceedings Below and the Federal Questions Presented

In May 1982, certain participants filed a declaratory judgment action in the Superior Court of Washington for Lewis County asking the Court to invalidate their obligations under the Participants' Agreements. Plaintiff participants named the Supply System and other participants as defendants, but pointedly invited defendant participants to join them as plaintiffs in seeking to avoid payment for the now-terminated projects. Before this could occur, Chemical, as trustee for the bondholders, initiated its own declaratory judgment action in the Superior Court of Washington for King County. After venue of the Lewis County Action was moved to King County, the Lewis County action was dismissed in favor of the Chemical action.

Chemical sought a declaration that the participants remained liable to honor their "dry hole" commitments. The trial court granted Chemical's and the Supply System's motions for summary judgment, holding that the Washington participants did have authority to make these commitments in order to provide electrical power to their constituents. *Chemical Bank v. Washington Public Power Supply System,* No. 82-2-06840-3, slip op. at 3-4 (Super. Ct. King County Nov. 16, 1982) Order On Motions For Summary Judgment (Appendix E, at 3). The issue of the participants' authority to enter into their "dry hole" commitments was then presented to the Washington Supreme Court by the participants on interlocutory appeal, with a few of the participants and the Supply System supporting Chemical.

On June 15, 1983, the Washington Supreme Court sent a shock wave through the municipal bond market by reversing the trial court. The Supreme Court held that the 28 Washington municipalities (representing 68% of the participants' obliga-

tions) had acted *ultra vires* seven years earlier in entering into the Participants' Agreements. This decision was reached despite Washington statutes expressly granting municipalities broad discretionary authority to purchase electricity, to construct or acquire power plants, and to enter into joint arrangements, and despite a statutory mandate and prior decisions by that Court that such municipal authorizations should be liberally construed. Now, according to the Court, while the participants had ample authority to assume for themselves the "dry hole risks" inherent in such undertakings, they could not do so jointly under the Participants' Agreements unless they met an additional and newly announced test: that they had exercised "sufficient control" over the projects. *Chemical Bank v. Washington Public Power Supply System,* 99 Wash. 2d 722, 666 P.2d 329 (1983) (hereinafter cited as *Chemical Bank I*) (Appendix B). Although the Court was reviewing the trial court's decision granting summary judgment, and although the trial court had reached its decision without articulating (or passing upon) any issue of participants' "control", the Washington Supreme Court for the first time in this case set forth the "control" issue, treated it as a factual one, and made its own findings of fact that the requisite control had been absent—all without affording any opportunity to present evidence on this newly announced legal standard.

Because the Washington Supreme Court's June 1983 *ultra vires* opinion was issued on interlocutory appeal and concerned only the authority of the 28 Washington municipal participants, the case was remanded to the Superior Court. There Chemical and the Supply System raised numerous legal and equitable claims for relief under state law independent of the *ultra vires* decision. Finally, Chemical and the Supply System urged that, if state law were to be construed to deny any remedy, then the actions of the participants, as otherwise judicially approved, constituted a taking without just compensation, impaired the bondholders' rights, and deprived the bondholders of their property without due process of law contrary to the Federal and state Constitutions.

Without hearing any evidence, the trial court rejected every argument and granted motions for summary judgment or entry of judgment in behalf of all participants. It excused the remaining 60 participants from all obligations under their agreements in light of the Supreme Court's decision excusing the 28 Washington municipal participants. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip op. at 2-3 (Super. Ct. King County, Aug. 11, 1983) Order and Judgment (Appendix D, at 2-3); *see also Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip op. at 2 (Super. Ct. King County, Sept. 16, 1983) Order Denying Motion For Reconsideration of Order and Judgment (Appendix C, at 2).

On the appeal from that judgment, Chemical and the Supply System again raised, among other grounds for reversal, Federal constitutional claims of taking without just compensation, impairment of property rights, and deprivation of property without due process. The Washington Supreme Court, however, three of the nine Justices dissenting, reaffirmed its prior *ultra vires* holding and upheld the trial court's rejection of all of petitioners' other claims. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874 (1984) (hereinafter cited as *Chemical Bank II*) (Appendix A). It determined that the participants' promises and assurances did not provide a basis for estoppel, 102 Wash. 2d at 905-09 (Appendix A at 31-36), that their expenditure of the bondholders' funds for public purposes did not provide any equitable basis for restitution, 102 Wash. 2d at 909-12 (Appendix A at 36-38), and that the resulting appropriation of the bondholders' property did not violate the Federal or state Constitutions, 102 Wash. 2d at 912-13 (Appendix A at 38-39). The Court declined to address the question raised by Chemical as to the appearance of partiality of any of its members who were ratepayers of any of the participants.

The three dissenting Justices condemned the result reached by the majority, and the process by which it reached that result, as flatly contrary to the "constitution, statutes and case law" of Washington and as violative of the Due Process and Takings Clauses of the Federal Constitution.

The dissenting Justices were sharply critical of the reaffirmance of the *ultra vires* holding:

> "The majority opinion throws into confusion a body of municipal law carefully developed over many years prior to this case which granted to municipalities broad authority in the exercise of their police powers. This power to manage their own affairs, subject to broad legislative guidance, has been carefully built into our constitution, statutes and case law. Our own recent cases, not mentioned by either majority opinion, confirm this." *Chemical Bank II*, 102 Wash. 2d at 915 (Appendix A at 42).

The majority opinion on lack of authority has also been criticized by all law review commentary pertaining to it.[6]

The dissent also pointed out that the majority made findings of fact on disputed evidence without any resolution of those factual issues in the trial court; indeed, without any trial of those issues. *Id.* at 920-21 (Appendix A at 47-48). The dissent disagreed with the denial of any remedy to the bondholders because the Supreme Court of the United States "continues to invoke the takings clause and the contracts clause to protect citizens from the transfer of private property to public purposes by governmental action", citing, *inter alia*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *Chemical Bank II*, 102 Wash. 2d at 914 (Appendix A at 41).

The three dissenting Justices were so offended by the majority's cavalier treatment of fundamental rights to procedural due process, and by the confiscation of the bondholders'

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[6] Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273 (1984); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of Ultra Vires Doctrine*, 5 U. Puget Sound L. Rev. 59 (1984); Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 59 Wash. L. Rev. 653 (1984); Note, *Chemical Bank v. Washington Public Power Supply System:* The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations, 69 Cornell L. Rev. 1094 (1984); Witten & Hecht, *supra* note 3, at 974-75.

property, that they took the unusual step of urging review by this Court:

> "The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event they do, the United States Supreme Court should exercise its discretion and accept this case for review. Our court's action is similar to that taken by many state courts in the reconstruction era which were reversed on constitutional grounds by the United States Supreme Court." *Id.* (Appendix A at 40-41).

Related Litigation

The failure of Projects 4 and 5 generated substantial additional litigation. Participants situated in Idaho successfully sought a decision on the lack of their authority under the Idaho Constitution from the Idaho Supreme Court.[7] In sharp contrast, the Supreme Court of Oregon unanimously refused to apply hindsight to relieve the Oregon participants from their undertakings.[8] Considering state statutory provisions similar to Washington's, the Oregon Supreme Court concluded that the

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[7] *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I), *cert. denied*, 105 S. Ct. 219 (1984). After the Idaho Supreme Court decision, the Washington Superior Court relieved the Idaho participants from any liability. A similar decision was reached by a Wyoming district court with respect to participants located there, but that judgment was vacated as moot following the Washington Superior Court's 1983 decision absolving all participants from liability. *Pacific Power & Light Co. v. Public Service Commission*, 677 P.2d 799, 804 (Wyo.) (Appendix H), *cert. denied*, 105 S. Ct. 120 (1984). Both the Idaho and Wyoming participants were parties in the Washington proceeding and are respondents here.

[8] *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G). Those Oregon participants, however, have been relieved of liability to the bondholders by virtue of the Washington Supreme Court's holding releasing all non-Washington participants. *Chemical Bank II*, 102 Wash. 2d at 880, 896-99 (Appendix A at 5, 22-26). The Oregon participants are respondents here.

Oregon participants had the authority that the majority of the Washington Supreme Court decided was lacking.[9]

There are also pending actions in federal court brought by Chemical and others alleging securities fraud, negligence and other causes of action against the participants, the Supply System, BPA and others.

REASONS FOR GRANTING THE WRIT

The nation's largest municipal bond default is naturally a matter of considerable public interest. But this case is important not merely for its size. The actions of the 88 participants—inducing the purchase of $2.25 billion of bonds, overseeing the expenditure of that vast sum for public purposes, and then repudiating their obligations and disclaiming any responsibility for restitution or other relief when the projects failed—raise grave issues concerning the appropriation of private property for public use without compensation.

Those actions, and the unprecedented, unforeseeable and unjustifiable decision of the Washington Supreme Court imposing the entire loss on the bondholders and rejecting all

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[9] Justice Linde, writing for the Oregon Court, observed that the risk found by the Washington Supreme Court to be *ultra vires* was an inevitable feature of the activities in which municipalities had long engaged:

> "[The participants'] agreements proved unwise in retrospect, and with the benefit of hindsight they may appear to have been unwise when made. But that is no reason to find them unauthorized. When a city has authority to provide electric power or other public services, that authority cannot well be construed to permit wise but to exclude unwise contracts. A long-term commitment to pay the cost of a needed source of supply could prove to be a financial calamity in many imaginable situations. A city might contract to assure itself of a supply of oil in a period of shortages and high prices only to have the market price collapse in a subsequent oil glut. . . . A city college might enter a long-term lease in order to have an apartment building converted to a dormitory for which there turns out to be no student demand. A desert city in need of a water supply might contract with some other entity to cover the costs of drilling wells in search of such a supply irrespective how little water was found. In the first example the price is excessive, the

equitable relief, present substantial questions under the Takings and Due Process Clauses of the Constitution, embodied in the Fourteenth Amendment, which were decided below contrary to principles established by this Court.

1. The Takings Clause Question Is Substantial.

This case raises important questions concerning the basic relationship between (1) the Constitution's express prohibition of uncompensated takings of property and (2) the prerogative of the states to define the contours of particular property rights and remedies involving municipalities. It is the unique function of this Court to harmonize these two competing and legitimate principles. Only this Court can determine whether states or municipalities—with the approval of state courts—may avoid the financial consequences of their unsuccessful projects and impose them on private parties or whether the Fourteenth Amendment will stand to prevent such action.

As this Court has repeatedly said, the Takings Clause (U.S. Const. amend. V, cl. 4), made applicable to the states by the Due Process Clause (U.S. Const. amend. XIV, § 1, cl. 3), embodies basic concepts of "justice and fairness". While there is no set formula for determining when "justice and fairness" require compensation, "the Court's decisions have identified several factors that have particular significance" in resolving what are "essentially ad hoc, factual inquiries". *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Among the most important factors are "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations". *Prune Yard Shopping Center v. Robbins,* 447 U.S. 74, 83 (1980).

(a) *Analysis of the Relevant Factors Demonstrates That a Taking Occurred.*

Analysis of each of these relevant factors demonstrates that a taking occurred, and that the bondholders were deprived of

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second acquisition proves superfluous, and the third may produce nothing in return for the money, but with respect to the issue of the cities' authority they are the same in principle. What distinguishes the present case is only the magnitude of the sums involved." 296 Or. at 584, 679 P.2d at 1338-39 (Appendix G at 39).

their rights, when the participants used the bondholders' funds for their projects, and then, with the Washington Supreme Court's approval, repudiated any obligation to repay any of those funds.

(i) There can be little doubt that the participants' actions interfered with bondholders' "reasonable investment-backed expectations". The participants created those expectations in the first place; the participants' payment promises were the projects' security. *E.g., Kaiser Aetna v. United States,* 444 U.S. 164, 179 (1979). While the projects were being financed and constructed, the participants gave repeated assurances of their authority when they approved each of the bond issues. Yet they repudiated those same assurances when the projects were abandoned after the bondholders' money was spent. The "reasonableness" of the bondholders' "investment-backed expectations" is confirmed by their good faith reliance on those assurances throughout. No one has ever suggested that the bondholders in any way acted in bad faith. The result, however, has been a complete divestiture of the bondholders' entire stake.

(ii) The extent of the "economic impact" of the participants' actions also demonstrates that a taking occurred. The impact was total. The bondholders have lost not only the benefit of their bargain, but their entire $2.25 billion principal amount as well.

(iii) Another pertinent factor is the "character of the governmental action"—whether it is a "public program adjusting the benefits and burdens of economic life to promote the common good", *Penn Central,* 438 U.S. at 124, or an effort to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163 (1980). The "character of the governmental action" is particularly offensive here, because these were projects undertaken by and for the governmental participants for the benefit of their public constituencies. However, by virtue of the participants'

belated repudiation of their obligations, and the unjustified refusal of the Court below to grant any relief, the bondholders alone are being required to bear the entire cost of these public projects.

(b) *The Result Here Conflicts with Webb's Fabulous Pharmacies.*

That an unconstitutional forfeiture has been exacted here is further illustrated by the conflict between the result reached in the Court below and this Court's decision in *Webb's.* There this Court held that state courts "by *ipse dixit,* may not transform private property into public property without compensation". *Webb's,* 449 U.S. at 164. Similarly, as Justice Stewart wrote, concurring in *Hughes v. Washington,* a case involving an alleged unlawful taking by the state:

> "We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest v. City Bank Co.*, 321 U.S. 36 (1944). Cf. *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95 (1938)." 389 U.S. 290, 296-97 (1967).

As in *Webb's* and *Hughes,* the decision by the Court below in this case demonstrates that a redefinition of state property rights and remedies "by *ipse dixit*" and "sudden change in state law" occurred in order to attempt to sanction the taking effected by the participants. In addition to the harsh and unpredictable ruling that the Participants' Agreements were

ultra vires, the Washington Supreme Court engaged in other retroactive manipulations of state law to "transform private property into public property without compensation" without the benefit of any "public program" justification. *Penn Central,* 438 U.S. at 124. For example:

(i) *The Purported Availability of an Earlier Declaratory Judgment Remedy.* The Court below decided that the bondholders' reliance interests must be sacrificed here because the bondholders were guilty of "neglect" in not obtaining, before any bonds were sold, a declaratory judgment as to the participants' authority to assume the "dry hole risk". *Chemical Bank II,* 102 Wash. 2d at 906 (Appendix A at 32); *see also id.* at 899, 905 (Appendix A at 25-26, 32). As with its rule on participants' "control", the Court below created this rule of decision *sua sponte;* it had not been factually developed, briefed, or argued, and the Court cited no authority for it.

By contrast to *Webb's,* where the claimants had clear, specific prior notice of the adverse claim against their funds and still prevailed, the bondholders here had no hint they should do something to protect their money before buying a bond. As even the majority below recognized, "all parties assumed that statutory authority existed". *Chemical Bank II,* 102 Wash. 2d at 899 (Appendix A at 25).[10]

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[10] Of course they did—and that assumption was hardly limited to the parties. The United States Nuclear Regulatory Commission reached the same conclusion when assessing the adequacy of the projects' financial backing. Observing that "the participants are obligated to make payments whether or not the project is completed, operable or operating," and that "[t]his method of financing large electric generating projects has been successfully utilized by WPPSS for several years," the Commission determined that the projects possessed the financial security required to allow issuance of a construction permit. 7 NRC 254, 257-58 (1978); *see also* 7 NRC 599, 629-31 (1978).

Indeed, as recently as January 1981, the Energy and Utilities Committee of the Washington State Senate described the participants' unconditional commitments as "secure financial arrangements" which "are characterized by the financial community as 'hell or high water'

Thus, this new state law doctrine, which was created by the Court below to deny the bondholders any remedy, cannot be justified on grounds of "neglect" or otherwise. That this new rule is wholly an aberrant creature of this case is further demonstrated by the illusory nature of the remedy the Court below held the bondholders should have sought. Quite simply, the declaratory judgment procedure invoked by the Court below to deny the bondholders' right to equitable relief has never existed under Washington law.[11]

(ii) *The Denial of Restitution.* Both in *Webb's* and in this case, money was loaned to a public body on promise of being returned. In *Webb's*, the county had repaid the principal; it was the confiscated interest that this Court ordered returned. Here, the public seeks to keep the benefit of both principal and interest, and the Court below, again invoking the *ultra vires* doctrine, has barred restitution of anything, principal or interest, to the bondholders. The Court offered two reasons for denying the bondholders restitution, but, again, neither of them passes constitutional muster:

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clauses because they are obligations for repayment in all events. 'Hell or High Water' arrangements rely on the participants' ability to sell electricity at whatever price from sources other than the plants under construction to pay for their share of the construction of those facilities whether or not any or all of them are ever completed or operating." Energy and Utilities Comm., Washington State Senate, WPPSS Inquiry: Causes of Cost Overruns and Schedule Delays on the Five Nuclear Power Plants, at 53 (Jan. 12, 1981).

[11] A party may not obtain a binding declaratory judgment in Washington unless there is a genuine adverse interest between the parties which creates a case or controversy. *See, e.g., Clallam County v. Board of Clallam County Commissioners,* 92 Wash. 2d 844, 848, 601 P.2d 943, 945 (1979). There was no such case or controversy here when the bonds were issued because both the participants and the bondholders were taking the same position that the participants' obligations were valid. *Chemical Bank II*, 102 Wash. 2d at 899 (Appendix A at 25). There is a Washington statute allowing special declaratory judgment actions to test the validity of municipal bond obligations, Wash. Rev. Code §§ 7.25.010-.040, but by the terms of the statute it cannot be invoked by bondholders or prospective bondholders. Wash. Rev. Code § 7.25.020.

First, the Court denied restitution from the participants because, it held, the benefit of the bondholders' loan had been conferred, not on the participants, but on the Supply System, which used the loan "for its purposes". *Chemical Bank II,* 102 Wash. 2d at 911 (Appendix A at 38). But the Supply System did not have any "purposes" of its own. The Supply System procured and spent the bondholders' money at the participants' behest for only one purpose—to enable the participants to obtain electrical power at cost.[12] For five years the participants had the use of the bondholders' money to pursue that objective through the joint operating agency. Thus, the dissent correctly observed:

> "[I]t was for the participants' benefit that the plants were being built in the first place. . . . [T]he real interested parties to this transaction were the participants. To them, the benefits flowed and, from them, restitution is therefore proper. . . . [J]ustice requires some relief to the bondholders." *Chemical Bank II,* 102 Wash. 2d at 936 (Appendix A at 62).

Second, the Court below upheld the refusal of the 28 Washington municipal participants to make restitution on the additional ground that their agreements were "substantively ultra vires". *Id.* at 911, 912 (Appendix A at 38). Prior Washington law had taught that municipal action could be found substantively *ultra vires,* and restitution denied, only "[w]here authority is so completely lacking [that] it seems fair to presume bad faith on the part of the private party". *Noel v. Cole,* 98 Wash. 2d 375, 381 n.3, 655 P.2d 245, 250 n.3 (1982).[13] There is no dispute here, however, that the bond-

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[12] Indeed, the participants themselves have maintained in this litigation that the Supply System "played the role of a financing conduit for the participants". Columbia Petitioners' Brief at 58, *Chemical Bank I* (Jan. 21, 1983).

[13] Here, the Court below itself acknowledged that such authority was not "so completely lacking" since, as the Court recognized, "all parties assumed that statutory authority existed" (*Chemical Bank II,* 102 Wash. 2d at 899 (Appendix A at 25)), and bond counsel had so opined. Also, by the Court's own reckoning, the participants had

holders loaned their money in absolute good faith, in reliance on the representations of the participants, their counsel, and independent bond counsel, all without an inkling that the participants lacked authority to enter into the Participants' Agreements.

At bottom, the only "justification" for the Court's harsh, retroactive result was the one forbidden by this Court in *Webb's:* to uphold an "exaction [of] a forced contribution" to municipal revenue. 449 U.S. at 163.[14] If the bondholders can

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authority to purchase electric energy, to acquire or construct electric generating facilities individually or through joint development (and bear the associated "dry hole" risk), and to enter into joint operating agency agreements to secure energy supplies. *Chemical Bank I*, 99 Wash. 2d at 782-97, 666 P.2d at 334-42 (Appendix B at 10-24).

[14] The holding of the Court below that the remaining 60 participants were excused from their contractual obligations because the 28 Washington municipal participants had been excused reflects a similar attempt to manipulate state law to assure that the confiscation of the bondholders' stake would be complete. The Court excused the remaining participants on the ground that release of the Washington municipal participants frustrated the purpose of the Participants' Agreements. *Chemical Bank II*, 102 Wash. 2d at 897-98 (Appendix A at 23-24). But the authority cited by the Court for its ruling makes clear that an event that might otherwise excuse performance on grounds of frustration of purpose does not do so where "a contrary intention" appears in the agreement. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wash. 2d 558, 562, 637 P.2d 647, 650 (1981). Section 6(d) of the Participants' Agreements establishes that such a "contrary intention" existed here. It provides that each participant would fund its fixed share of the debt service *whether or not* other participants performed their obligations under the agreements.

The Court also excused the remaining participants on the additional ground that a mutual mistake had been made regarding the authority of the 28 Washington municipal participants. *Chemical Bank II*, 102 Wash. 2d at 898-99 (Appendix A at 24-26). However, it is well established that the doctrine of mutual mistake excuses performance only if the party seeking relief was "adversely affected" by its mistake. *E.g., Restatement (Second) of Contracts* § 152 (1981). Since under Section 6(d) of the agreements the liability of the remaining participants was the same regardless of whether the 28

be denied any relief by an unforeseeable and unjustifiable interpretation of state law of the type created by the Washington Supreme Court, the protections of the Fourteenth Amendment will have been seriously eroded.

As the dissent forcefully states at length, there is simply no principled basis for the majority decision below. It disregards relevant Washington statutory and case law in an effort to protect citizens of Washington at the expense of the bondholders. If the same action had been taken by the Washington Legislature, that would have violated the Contract Clause (art. I § 10, cl. 1) of the Federal Constitution.[15] As recent cases have suggested, the Takings Clause, the Contract Clause and the Due Process Clause rest on the same underlying principles. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 & n.12 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 14-15 (1977); Note, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 57, 98 (1978) (comparing Contract Clause and Takings Clause); Note, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 84 (1977) ("constitutional jurisprudence has tended to subsume the [contract] clause under the due process and takings provisions of the fifth and fourteenth amendments").

While court decisions generally do not violate the Contract Clause (*see Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924)), what happened here—the denial of all relief by a majority bent on that result—offends the Fourteenth Amendment and its guarantee against deprivation of property without due process of law. When states act to impair their own obligations, this

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Washington municipal participants performed their obligations, the remaining participants were not adversely affected by any mistaken assumptions about the authority of the Washington participants.

[15] The forfeiture upheld below is a far more drastic impairment than the initiative adopted by the voters of Washington in 1981 curtailing the authority of the Supply System which was held to violate the Contract Clause in *Continental Illinois National Bank and Trust Co. v. Washington*, 696 F.2d 692 (9th Cir.), *appeal dismissed*, 460 U.S. 1077 (1983).

Court has insisted upon strict scrutiny. *United States Trust Co. v. New Jersey*, 431 U.S. at 25-26. Such scrutiny is called for here where the participants, with the approval of the majority below, have acted, not just to impair the bond contract, but to take the bondholders' entire stake.

2. The Procedural Due Process Clause Questions Are Substantial.

Procedural due process requires notice, an opportunity to be heard, and an impartial tribunal. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (notice); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (opportunity to be heard); *In re Murchison*, 349 U.S. 133, 136 (1955) (impartial tribunal). The decision below denied the bondholders each of these essential elements of procedural due process.

(a) *The Bondholders Were Denied Notice and an Opportunity to be Heard on Critical Factual Issues.*

This case has proceeded through several state court hearings, but none of those hearings was evidentiary. Nonetheless, the Court below raised and resolved criticial issues of disputed fact in violation of the bondholders' procedural due process rights. The Fourteenth Amendment requires " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case, *Mullane v. Central Hanover Tr. Co., supra*, at 313.' " *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (*quoting Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)).

In *Chemical Bank I*, the Washington Supreme Court invented a new and wholly unforeseeable "control" test for the authority of municipalities to contract for "dry hole risks" in power plant construction. 99 Wash. 2d at 787, 666 P.2d at 337 (Appendix B at 14). If the participants had "sufficient control", then they could jointly assume a "dry hole risk" even under the Washington Supreme Court's strained interpretations

of state law. *Id.* at 784-85, 666 P.2d at 336-37 (Appendix B at 14-18); *Chemical Bank II*, 102 Wash. 2d at 892-93 (Appendix A at 18-20).

Because this "sufficient control" test did not exist before *Chemical Bank I*, neither the bondholders nor the Supply System had prior notice or opportunity for a hearing on the issues involved. The Court below treated this new "control" test as a factual question which it should resolve and found the facts it wanted to support its conclusion. The Court below found that:

> "Considering the complexity of the various budgetary items, construction decisions and financing arrangements involved in a project of this scope, *it seems unlikely* that a part-time committee of representative participants could provide significant input to the management of the projects with such rigid procedural requirements". 99 Wash. 2d at 787, 666 P.2d at 337 (emphasis supplied) (Appendix B at 15).

The Court also found that "the participants' committee *apparently* served as a rubber stamp for WPPSS' decisions". *Id.* (emphasis supplied.)

The trial court on remand concluded that it could not reopen these findings, and neither the bondholders nor the Supply System ever had any opportunity to present evidence on this issue. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, transcript at 4-5 (Super. Ct. King County, Aug. 29, 1983) (Verbatim Report of Proceedings Before the Honorable Joseph Coleman) (Appendix C at 6). When the bondholders and the Supply System then asked the Washington Supreme Court to allow a hearing on the issue of "control", however, the Court responded that the "control" issue was actually "a question of law". *Chemical Bank II*, 102 Wash. 2d at 894 (Appendix A at 20). As previously noted, *see supra* at 12-13, the three dissenting Justices condemned this appellate fact finding as "contrary to all our previous case law" and asked for review by this Court. *Chemical Bank II*, 102

Wash. 2d at 914 (Appendix A at 40).[16] Even counsel for the Washington Public Utilities Group, which includes many of the participants and respondents here, has conceded in open court in the federal securities litigation involving the Supply System that the Washington Supreme Court, when it decided the "control" issue, decided a contested issue of fact.[17] And evidence recently taken in that same litigation—the deposition testimony of a leading representative of the participants on the Participants' Committee—directly controverts the appellate fact-finding undertaken by the Washington Supreme Court and thereby underscores the denial of due process which has occurred here.[18]

In sum, as the opinion in *Chemical Bank I* plainly reveals, the majority was engaged in fact finding when it considered matters such as the relative complexity of the projects and how the "apparent" "rubber stamp" function of the Participants' Committee bore directly on the issue of "control" and made "it seem unlikely" that sufficient "control" existed to satisfy the majority's new test of municipal authority. By the very terms used by the Court, those were factual matters.[19] The Court below improperly chose to notice and rely upon those contested factual matters,[20] while ignoring uncontested facts and related statutory provisions—for example, that the participants held

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[16] *See also Chemical Bank II*, 102 Wash. 2d at 920 (Appendix A at 47), *citing* Wash. Const. art. IV, § 6 (powers of trial courts); *Stringfellow v. Stringfellow*, 56 Wash. 2d 957, 959, 350 P.2d 1003, 1004 (1960) (resolution of factual disputes remains the exclusive province of the trial court).

[17] The relevant portion of the transcript in which this concession was made is attached as Attachment A to this petition.

[18] The pertinent excerpt of that testimony is attached as Attachment B to this petition.

[19] *See also Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145 (1939) (existence of control is "an issue of fact to be determined by the special circumstances of each case").

[20] Due process only permits judicial notice of facts that are "determinate" or "notorious". *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 300-02 (1937); *see also United States v. Abilene & Southern Railway Co.*, 265 U.S. 274, 288-90 (1924). The facts noticed by the Washington Supreme Court in

voting control of 87% of the Supply System's Board of Directors, *Chemical Bank II*, 102 Wash. 2d at 922 (Appendix A at 49), which was statutorily charged with management and control of the Supply System (*supra* at 5 & n.1).

Control was not the only factual issue the Court decided without allowing presentation of evidence. The Court held that "to establish equitable estoppel, every particular must be proven by the plaintiff with clear, cogent and convincing evidence. . . . We believe that plaintiffs have not met this burden." *Id.* at 905 (Appendix A at 31).

The bondholders' equitable estoppel claim, however, was dismissed by the Court below as a matter of law. Because there was no trial below, the bondholders never had an opportunity to present evidence to meet *any* evidentiary burden, let alone the exacting burden of proof imposed by the Court. *See Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 169, 171 (1935) (state court violated due process by holding that "'[t]he burden . . . of overcoming this presumption . . . rests upon the plaintiffs in error'" and then denying them an opportunity to present evidence to rebut the presumption).

(b) *The Bondholders Had No Notice or Opportunity to Protect Their Rights.*

As discussed *supra* at 18-19, the Court below held that the bondholders should have obtained a declaratory judgment regarding the participants' authority to assume the "dry hole

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finding that no control existed do not rise to this level of common knowledge. "[T]o press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial". *Ohio Bell Telephone*, 301 U.S. at 302. *See also Saunders v. Shaw*, 244 U.S. 317 (1917) (Holmes, J.). In *Saunders*, as in the present case, the state supreme court applied a new interpretation of the law, under which a factual question (the existence of "benefit") was controlling. Saunders had argued successfully in the trial court that "benefit" was immaterial and had prevailed without presenting evidence on that issue. The state supreme court reversed on rehearing, finding that there was no "benefit". This Court reversed, holding that Saunders had been denied his opportunity to be heard, contrary to the Fourteenth Amendment. 244 U.S. at 319.

risk"; however, the bondholders were given no notice that they were required to seek that remedy and, in fact, they could not have obtained a binding declaratory judgment because of the lack of the necessary controversy.

This retroactive invocation by the Court below of an unavailable remedy is itself a denial of due process. State courts cannot, consistent with the Fourteenth Amendment, deny relief on the ground that parties should have sought a different remedy at an earlier time when that remedy was not available; parties must be afforded a "real opportunity" to protect their rights. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 678-79, 682 (1930); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457 (1958). That was not afforded to the bondholders here.

(c) *The Bondholders Were Denied Their Right to an Impartial Tribunal.*

The Court below, composed of elected Justices,[21] failed even to address the question whether any of its members should be disqualified from hearing the appeal. Chemical had asked that any Justice of the Washington Supreme Court who was a ratepayer of one of the participants be disqualified on the ground that the Justice had at least the appearance of a conflict of interest.[22] Yet the Court declined even to respond to Chemical's request. It was simply ignored.[23]

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[21] Wash. Const. art. IV, § 3 (Justices of Washington Supreme Court re-elected every six years).

[22] Chemical did not know whether any Justices were ratepayers, but information supplied by the Clerk of the Washington Supreme Court indicated that two members of the Court which decided *Chemical Bank I* were residents of Washington communities served by respondents. One of those Justices was not a member of the *Chemical Bank II* Court; the other Justice wrote the majority opinion in *Chemical Bank II* and the respondent serving his community had a 10.7% share of Projects 4 and 5 (representing a debt service obligation of over $700 million). This Court has held that an indirect financial stake in the outcome of litigation is sufficient to disqualify decision-makers on constitutional grounds. *Gibson v. Berryhill,* 411 U.S. 564 (1973); *see also Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *Tumey v. Ohio,* 273 U.S. 510 (1927).

[23] In striking contrast, every federal district judge in the Western District of Washington has disqualified himself or herself from

CONCLUSION

This case raises serious questions about municipal financing, public morality and trust in government. The thousands of bondholders, many of them individuals who invested their life savings, suffered a complete forfeiture of their funds while at the same time they were denied elemental due process rights by the Washington state courts. The promises made to secure the bondholders' loan have been repudiated, their money has been spent for public purposes, and they have been refused any remedy.

The inevitable result of the decision below will be to erode confidence in the institutions of government. The decision will encourage, if it does not require, government officials to raise claims of *ultra vires* to protect their constituents whenever a large public project fails. The pressures to protect the public against unwise decisions taken in its name—at the expense of politically powerless minorities—can be enormous, as this case shows. Those pressures should be resisted now, as they have been in the past.

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presiding over Supply System litigation. The result has been that federal securities litigation now pending in Seattle was assigned to a federal judge from Arizona. And, over the objection of the participants, that judge ruled that the securities case will not be tried in the Pacific Northwest because of the danger of jury bias. *In re Washington Public Power Supply System Securities Litigation,* M.D.L. No. 551 (W.D. Wash. Oct. 10, 1984) Order. On January 22, 1985, after that judge learned that his parents held Supply System bonds, he recused himself on his own motion and another judge from the District of Arizona has been designated.

This case thus raises substantial issues of national importance under the Fourteenth Amendment worthy of review by this Court, and this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attachment A

Transcript of Oral Proceedings
Before the Hon. Richard M. Bilby
In re Washington Public Power Supply System Litigation
M.D.L. No. 551 (W.D. Wash. Dec. 2, 1983), Tr. 435-36

"MR. MALANCA [counsel for certain utilities]: Your Honor, the question, getting back to control for just a moment, and that's the only point I'm going to speak to. The issue of control was, in fact, litigated by the Supreme Court, Your Honor. There were extensive affidavits. The wording of the Supreme Court in their decision really parrots the evidence that was filed on behalf of one of my clients, an individual from Clark County. In addition to that, Mr. Cosmotta [sic], a long-time employee, a key, critical employee of the Supply System filed a very extensive affidavit contesting all of that issue. So it, in fact, I think the Court needs to take some time and think about the control question because in fact that was litigated. Now, not necessarily—

"THE COURT: You mean it was litigated by affidavit, and the Supreme Court decided a contested issue on an affidavit?

"MR. MALANCA: Yes.

"THE COURT: I never heard that before.

"MR. MALANCA: Well, that was what was done, Your Honor, and it was done on the basis that a decision had been made on a summary judgment based on affidavits on the matter.

"THE COURT: Did Judge Coleman [the trial judge] ever rule on the contested issue of control based on this affidavit? I may have missed something in what I read, but I was not aware that Judge Coleman had conflicting affidavits, made the determination of fact and based a ruling on it.

"MR. MALANCA: No, but the affidavits were in the files, and the Supreme Court in reviewing those affidavits made that ruling."

Attachment B

Deposition Testimony of Robert L. McKinney, General Manager of Cowlitz County Public Utility District and a Member of the Participants' Committee from 1976 to March 1982, Given on January 22, 1985, Tr. 551, 561, 628-35

"Q. Did you believe at any time that the Participants Committee was a rubber stamp for the Supply System's decisions?

"A. No.

". . .

"Q. Did you have a personal view as to the degree of control that the Participants Committee should exercise over the construction of the projects?

"A. Yes.

"Q. What was your view, sir?

"A. I viewed that it should be similar to my experience with the Mid-Columbia projects that we were involved with over the years, which as a matter of contract have what we call a purchaser's advisor committee. And in summary, in those cases which preceded this, in my experience, the entity sponsor or owner of the plant had to be in management and policy control of their own project, and that the advisor committees, we called them — purchasers advisor committee, the function was very similar to what I thought was proper and very close to what I believed was a proper role of the Participants Committee with regard to Plants 4 and 5.

"Q. Did that advisor committee have the powers that are reflected in the participants agreement as ultimately signed by the participants in Projects 4 and 5?

"A. Yes, they are very similar.

". . .

"Q. In general, Mr. McKinney, do you believe that you kept the participants that designated you as their representative informed of matters that were considered by the Participants Committee?

"A. I do.

". . .

"Q. Did your perception of the Participants Committee's role change during the period of time that you were a Participant Committee member?

"A. Yes.

"Q. Would you describe to me how it changed?

"A. When I undertook to accept this additional assignment I had contemplated that our function as being a conduit between participants and the Supply System, in the sense as a purchaser's-advisor-type committee, would require meetings approximately once a quarter, maybe slightly more often. But as these problems began to increase, they seemed to require many more meetings and I eventually in March of 1982 found that it was taking far too much time for me to try to cover just because of the number of meetings. And therefore, I resigned from the Participants Committee.

". . .

"Q. What was the reason for the increasing workload and frequency of meetings of the Participants Committee?

"A. A number of things.

". . .

"Q. How about schedule delays?

"A. Which resulted in increases in budgets. All these things resulted in increases in budgets.

"Q. And these are the things that required a very much greater workload on the part of the Participants Committee?

"A. It became — yes, it became very — the need, or the apparent need by some to consider the balanced financing program, took a lot of time.

". . .

"Q. It took a lot of time with the Participant Committee?

"A. It took a lot of time, yes.

". . .

"Q. Did the increasing budgets of the Supply System, construction budgets, require more time and consideration by the Participants Committee?

"A. Oh, yes.

"Q. And did the fact that there were schedule delays and contract change orders require more consideration by the Participants Committee?

". . .

"A. Since the primary function of the participants Committee was to serve as a conduit for information, any change of the type that we are talking about did increase the amount of information to be communicated.

". . .

"Q. You mean to the participants?

"A. To the participants and to all the public agencies of the Pacific Northwest.

"Q. Wasn't another primary function of the Participants Committee to consider every change order in the construction of Plants 4 and 5 that exceeded $2 million?

"A. Change orders over a limit.

"Q. $2 million. Didn't the Participants Committee have to consider any award of any contract or approval of any change order in excess of $2 million?

"A. That's my recollection.

"Q. And as the construction process got bigger and bigger didn't that require more time of the Participants Committee to consider those?

". . .

"A. Yes

". . .

"Q. Mr. McKinney, my only question was whether the Participants' Committee spent considerable time on the approval of the fuel plan.

"A. And my answer, of course, was yes.

". . .

"Q. What about the proposed bond resolutions? As need for the Supply System to go to the bond market ever more frequently occurred, the Participants Committee had to spend more time on considering the bond resolutions to sell those bonds, didn't it?

"A. Yes."

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84-1258
No.

IN THE

Supreme Court of The United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

APPENDIX TO THE PETITION FOR CERTIORARI

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APPENDIX A
102 Wash. 2d 874

[No. 49868-7. En Banc. November 6, 1984.]

CHEMICAL BANK,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1, ET AL.,

Respondents.

Utter and Dolliver, JJ., and Alexander, J. Pro Tem., dissent by separate opinion; Andersen, J., did not participate in the disposition of this case.

NATURE OF ACTION: The trustee for the bondholders of two terminated nuclear power plant construction projects sought a declaratory judgment obligating participants in the projects to make their share of the principal and interest payments on the bonds to the Washington Public Power Supply System. The Supreme Court at 99 Wn.2d 772 reversed a partial summary judgment in favor of the trustee, holding that 28 Washington municipalities and public utility districts, representing 70 percent of the total contractual obligation, lacked statutory authority to enter into the financing agreement.

SUPERIOR COURT: The Superior Court for King County, No. 82-2-06840-3, H. Joseph Coleman, J., on August 11, 1983, granted a summary judgment releasing all contract claims against all 88 participants in the projects.

SUPREME COURT: Holding that certain bondholders were not entitled to intervene, that the 28 Washington municipalities and public utility districts lacked authority to enter into the financing agreement, that the Legislature had not ratified the agreement, that the obligation of the 60 remaining participants was unenforceable, that various equitable remedies were in-

applicable, and that no constitutional violations were proved, the court *denies* intervention by the bondholders and *affirms* the judgment.

Betts, Patterson & Mines, P.S., by *Michael Mines* (*Robert F. Mullen, Ralph L. McAfee, Richard S. Simmons*, and *Cravath, Swaine & Moore*, of counsel), for appellant Chemical Bank.

Culp, Dwyer, Guterson & Grader, by *Richard C. Yarmuth, Michele Coad, Robert 0. Marritz*, and *Earle J. Hereford, Jr.*, for appellant Washington Public Power Supply System.

Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern, by *Albert R. Malanca, Kenneth G. Kieffer*, and *Donald S. Cohen*, for respondent Washington Public Utilities Group.

Helsell, Fetterman, Martin, Todd & Hokanson, by *Richard S. White, David F. Jurca*, and *Linda J. Cochran*, for respondents Columbia Rural Electric Association, Inc., et al.

Stimson Bullitt, John D. Lowery, and *Thomas W. Burt* (of *Riddell, Williams, Bullitt & Walkinshaw*), for 21 respondents.

Jones, Grey & Bayley, P.S., by *Hugo E. Oswald, Jr., Margaret A. Pageier, Richard L. Goldfarb*, and *James A. Miller; George F. Hanigan;* and *James P. McNally* and *McNally & Stewart*, for respondents City of Ellensburg, et al.

Lane, Powell, Moss & Miller, by *John R. Tomlinson, H. Peter Sorg, Jr.*, and *Timothy F. Brown*, for respondents Oregon PUD's.

Hillis, Phillips, Cairncross, Clark & Martin, P.S., and *Jerome L. Hillis, Michael F. Schumacher*, and *Gregory E. Keller*, for 9 respondents.

Dwight A. Halstead and *Halstead & Ingvalson*, for respondent Benton Rural Electric Association.

Brown, Thayer & Drummond, by *Robert M. Brown*, for respondent Inland Power and Light Co.

Thoreson, Berry, Yost & Matthews and *Ernest C. Matthews IV* (*Robert H. Jaffe* and *Jaffe & Schlesinger*, of counsel), for intervenors.

John R. Allison, Sharon S. Armstrong, and *Alan P. Sherbrooke* on behalf of the City of Seattle, amici curiae.

Michael D. McKay and *Charles Webb III* on behalf of National WPPSS 4 and 5 Bondholders Committee, amici curiae.

ROSELLINI, J.—

This case first came before our court in *Chemical Bank v. WPPSS,* 99 Wn.2d 772, 666 P.2d 329 (1983) (*Chemical Bank* I) for resolution of the issue of whether 28 municipalities and public utility districts (PUD's) had statutory authority to enter into agreements to build Washington nuclear plants (WNP) 4 and 5. We held that no statutory authority, express or implied, existed and remanded the case for action in accordance with the opinion.

The trial court entered summary judgment in favor of all 88 participants (respondents) in WNP 4 and WNP 5. On appeal, appellants Washington Public Power Supply System (WPPSS) and the bondholders' trustee, Chemical Bank, raise multiple challenges to the trial judge's order of summary judgment.

Appellants also seek review of our decision in *Chemical Bank* I under the terms of Rules of Appellate Procedure 2.5(c)(2).

This factual and legal background, discussed in *Chemical Bank* I, is exceedingly complex. The primary legal issues discussed at length in this opinion can be summarized as follows:

Procedural Questions

1. Should this court reconsider its decision in *Chemical Bank* I?

2. Did the trial judge's order granting summary judgment in favor of all defendants exceed the proper scope of the declaratory judgment action initiated by Chemical Bank?

3. Are any bondholders entitled to intervene in this action at this stage in the proceeding?

Contractual Obligation

4. Do the Washington municipalities and PUDs have statutory authority, either express or implied, to enter into contracts which impose the risk of dry holes on their ratepayers?

5. If the Washington municipalities and PUDs did not initially have statutory authority to enter into these contracts, did the Legislature subsequently ratify the agreements?

6. Did the trial judge err in holding that, because the contracts were unenforceable as to the Washington municipalities and PUDs, they were also unenforceable as to the remaining defendants under any of these three theories: (a) indivisibility of contract? (b) mutual mistake? (c) commercial frustration and impracticability?

Availability of Equitable Remedies

7. If the participants are not contractually obligated to the bondholders, are they nonetheless estopped from denying the obligation under either common law notions of estoppel or article 8 of the Uniform Commercial Code?

8. If the contracts are invalid, are the bondholders nonetheless entitled to restitution from the participants?

Constitutional Claims

9. Did the release of the participants' contractual obligation violate the bondholders' constitutional rights?

Our resolution of this case is as follows:

I

Procedural Preliminaries

For the reasons discussed below, we believe reconsideration of our decision in *Chemical Bank* I is appropriate. We find

the summary judgment order did not exceed the scope of the declaratory judgment action and conclude the bondholders' motion to intervene should be denied.

II

Contractual Obligations

We herein affirm our decision in *Chemical Bank* I and reject appellants arguments that the Legislature ratified the ultra vires contracts. We also affirm the trial judge's release of the 60 remaining participants' obligation on the grounds of commercial frustration and mutual mistake.

III

Equitable Obligations

Our review of the historical origins of equitable estoppel convinces us that the doctrine should not be applied to the facts of this case. We find that the statutory equivalent of equitable estoppel under the Uniform Commercial Code, RCW 62A.8-202, is inapplicable.

IV

Constitutional Claims

We find no violation of appellants' state or federal constitutional rights.

STATEMENT OF THE CASE

Procedurally, this case comes before the court following the trial judge's decision to grant summary judgment in favor of all defendants/participants in WNP 4 and WNP 5. *Chemical Bank* I contains an extensive factual recitation. In addition, the following information pertains to the present action.

WPPSS is a joint operating agency and municipal corporation composed of 19 Washington public utility districts

(PUDs) and four cities. It was formed in 1957 under the provisions of RCW 43.52.360. That statute allows cities or public utility districts and combinations thereof to form an operating agency "for the purpose of acquiring, constructing, operating and owning plants, systems and other facilities . . . for the generation and/or transmission of electric energy and power." The statute further provides that after such an agency is formed, any other city or PUD may become a member upon application and affirmative vote of a majority of its members. A member may withdraw provided "[t]hat all contractual obligations incurred while a member shall remain in full force and effect." The agency may be dissolved upon the unanimous agreement of its members and "the members, after making provisions for the payment of all debts and obligations, shall thereupon hold the assets thereof as tenants in common."

In the early 1970s, WPPSS started construction of three nuclear power plants, WNP 1, WNP 2, and WNP 3. The projects were developed in conjunction with the Bonneville Power Administration. Although those plants also ran into financial trouble, it is the fate of two subsequent plants, WNP 4 and WNP 5, which concerns us here. Plans for these plants were developed when the 88 participants, respondents, joined with WPPSS and Pacific Power & Light Company (WNP 5 only) to obtain financing.[1] Each participant signed an identical 63-page participants' agreement (PA) dated July 14, 1976.

WPPSS then adopted a bond resolution which provided for the construction of both plants and the issuance of revenue bonds. As many of the parties' claims stem from interpretation of the PA, a detailed analysis of this document is necessary.[2]

As noted in *Chemical Bank* I, the PA provided that each participant purchase a "share of the Project Capability" and "a

---

[1] Respondents include 9 Washington cities; 7 Oregon cities; 5 Idaho cities; 19 Washington PUD's; 1 Washington irrigation district; 43 rural electric cooperatives; and 4 Oregon PUD's.

[2] All page references are to the bound volume submitted as appendix to this appeal.

right to purchase a share of the capability of any other generating plants undertaken by [the] Supply System . . ." PA, at 2. Project capability was defined as

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

In addition, the participants' agreement gave each participant certain rights, both individually and through representatives on a participants' committee. As appellants claim the participants' committee granted significant control to the participants, a detailed analysis of its function is appropriate.

The committee was to be composed of not less than two nor more than seven members and participants were entitled to designate which representative would vote their shares. PA § 15(a). The participants' committee was required to meet at least quarterly during the construction of the projects. PA § 15(b). Committee meetings could be called any time, however, if representatives with 20 percent of the participant shares so requested. Casting individual votes for each participant's share they represented, committee members were *required* to vote the shares in the manner requested by the participants they represented. PA § 15(b), at 40.

The participants' agreement also detailed procedures for the transfer of information from WPPSS to the committee members and interested participants. The participants' agreement stated that the WPPSS was to provide the committee and any participants who so requested with the following information:

> Determination of Minimum Capability.
>
> Construction budgets and changes therein (Section 8(a)).

Award of any contract or approval of any change order, in either case in excess of $2,000,000, or such other contracts as determined by the Participants' Committee.

Budgets of annual costs and revisions thereof (Section 8(b)).

Fuel Plan, changes therein, and determinations relating thereto (Section 9).

Operating schedules (Section 10).

Insurance coverage, including limits and choice of insurers (Section 11).

Estimates of costs of repair of damage to a Project if in excess of $5,000,000, recommendation whether to repair in whole or in part or to remove from service and construction budget for repair of Project.

Sales of salvage materials in excess of such minimum amount as is established by the Participants' Committee.

Change of an architect-engineer.

Proposed Bond Resolutions.

Any proposal made by Participants' Committee members representing Participants' Shares voting rights of 20% or more.

Construction or acquisition of Nuclear Project No. 5 pursuant to Section 22(b) of the Ownership Agreement.

Repair of Nuclear Project No. 5 pursuant to Section 16(b) of the Ownership Agreement.

Increase in the Supply System's ownership interest in Nuclear Project No. 5 pursuant to Section 20 of the Ownership Agreement.

PA § 15(c), at 41-42.

Members of the participants' committee, representing 20 percent or more of the shares, could disapprove of any action by WPPSS in the above areas and could force the matter to be

reviewed by a project consultant.[3] Using this power, the record indicates that the participants' committee disapproved the 1983 annual budget and disapproved of a contract settlement because the allocation of damages between WNP 3 and WNP 5 was "inequitable."

Finally, the participants were granted certain rights in the completed plants. They were given a share of project capability, and the right to have the plants' output adjusted to meet their needs. PA § 9. If the projects were terminated, the projects' assets were credited to the participants' accounts. PA § 13. Pursuant to this agreement, WPPSS issued $ 2.25 billion worth of bonds in 14 series. When the projects ran into massive cost overruns, WPPSS decided to terminate the plants prior to completion. Many of the participants then repudiated their obligations.

Chemical Bank, the trustee for the bondholders, filed a declaratory judgment action in King County Superior Court in May 1982, seeking a legal determination that the participants were contractually bound to make payments to WPPSS pursuant to the participants' agreement payment schedule.

In late 1982, the trial judge granted Chemical Bank's motion for summary judgment. He held that the participants were required to fund their respective shares of the debt service on the bonds, even if the projects were never completed. He also ruled that the participants were required to fund the costs of decommissioning the terminated projects. He further found that the Supply System and the Washington participants had statutory authority to enter into the participants' agreements. The trial judge concluded that the municipal participants' obligations were not violative of Washington's constitutional limit on incurring debt, and were not an unlawful delegation of power or authority. This court granted discretionary review and rejected the trial judge's conclusion that the Washington municipalities had authority to enter into these contracts.

---

[3] If a matter went before a project consultant, his task was to determine whether WPPSS's actions conformed with prudent utility practice. PA § 16.

The case was returned to the trial court for action in accordance with the opinion. Several defendants moved for summary judgment based on this court's mandate. The judge ordered summary judgment in favor of all the defendants. The order provided, in part:

> 1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires,* void *ab initio,* invalid, ineffective and unenforceable;
>
> 2. Inasmuch as the Participants' Agreement is *ultra vires,* void *ab initio,* invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

Order and Judgment, August 11, 1983, at 2-3.

The court then rejected all objections and contentions raised in opposition to this motion by Chemical Bank and WPPSS, concluding that

> none of the moving defendants or any other participant defendant is obligated . . . to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS . . .

Order and Judgment, August 11, 1983, at 3.

This court granted review to resolve the issues set out above.

I

Procedural Preliminaries

A. Reconsideration of Chemical Bank I

The issue of statutory authority was addressed in *Chemical Bank* I. Nonetheless, appellants seek review of that decision under the provisions of RAP 2.5(c)(2).

Appellants urge that reconsideration is appropriate because of the importance of the issues raised by the case, and because reconsideration is authorized by the Rules of Appellate Procedure (RAP).

RAP 2.5(c)(2) states:

> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

A comment to this rule notes that application of this section is mandatory when justice would be best served by a reexamination of the law at the time of the later review. The comment states prior law, referring to the predecessor rule as discretionary, is superseded.

We conclude the complexity of the statutory authority issue and the importance of this litigation to thousands of individuals require a balance between principles of finality embodied in the Rules of Appellate Procedure and the interests of those involved. Moreover, we note consideration of issues raised for the first time in this second appeal by necessity involve discussion of the issues decided in *Chemical Bank* I. We will therefore first reevaluate our decision in *Chemical Bank* I and then turn to those issues new to this appeal. Before doing so, however, two other procedural matters must be addressed.

B. Intervention

The final issue arises from a motion by six bondholders to intervene in this action. Intervenors base their motion on the provisions of CR 24 and RCW 7.24.010.

By court rule, intervention should be permitted, *upon timely application,*

> (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

CR24(a), in pertinent part.

RCW 7.24.110 states the specific rule governing declaratory judgments. It provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In *Williams v. Poulsbo Rural Tel. Ass'n,* 87 Wn.2d 636, 555 P.2d 1173 (1976), this statute was characterized as jurisdictional. The court held that failure to include an affected party, *i.e.,* an essential party, required remand of the case. *Williams,* at 643. This is the relief sought by bondholders.

The motion requests "that this Court remand this action back to the trial court for further proceedings to give an opportunity for all holders and former holders of the Bonds to join this action as party plaintiffs." The proposed intervenors suggest that in such further proceedings they will be in a position to litigate claims which Chemical Bank has made, but for various reasons may be precluded from pursuing, either in

state court or in federal court, or both. The complaint in intervention would also add claims not previously made in this litigation, and would bring in new defendants. The complaint states, for example, negligence and malpractice claims against engineers and attorneys.

Relying on *Martin v. Pickering,* 85 Wn.2d 241, 533 P.2d 380 (1975), the various responses to the motion note that it is not timely.

We note, however, the declaratory judgment statute does not have a timely exception. Also, in *Williams,* this court's characterization of the failure to join interested parties in a declaratory judgment action as a jurisdictional defect suggests no timely element is necessary. On the other hand, CR 24 clearly requires timely application, even when a statute confers an unconditional right to intervene. This leaves an apparent conflict between the way the statute has been interpreted and the court rule.

When statutory provisions and rules of court adopted by the Supreme Court conflict, the court rule governs. *Emwright v. King Cy.,* 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Here, however, the conflict is not so much between the statute and the court rule as it is between our interpretation of the statute and our court rule. We believe this conflict must be resolved in favor of requiring timely application, even when intervention is a matter of right granted by statute.

First, efficient management of litigation can be achieved only by timely application.[4] Here, for instance, the bondholders' motion to intervene would require reevaluation of matters already argued by the parties and determined by the trial court. This would in turn require duplication of work by attorneys and the judicial system at a staggering cost to all.

Second, principles of finality weigh in favor of requiring timely application. Where, as here, thousands of potential

[4] To the extent that the language in *Williams v. Poulsbo Rural Tel. Ass'n, supra,* suggests the opposite result, it is overruled.

intervenors/plaintiffs exist, the defendants to the action cannot be expected to defend each action brought by bondholders dissatisfied with the initial result.

Our conclusion that timely application is required disposes of the bondholders' motion, which was not filed until this action reached the late stages of the appellate process.

We turn now to the subsidiary question of whether the bondholders are bound by the results of this litigation. The trial judge's order released all claims, including the bondholders', raised against the participants. The declaratory judgment statute, however, states that an interested party who is not joined cannot be prejudiced by the results of the declaration. Since the bondholders are certainly parties who have an interest in the litigation, we must decide whether this section of the statute will be interpreted literally. If so, that portion of the order pertaining to the bondholders must be struck.

We believe that this result would be improper, where, as here, the interested parties have a *designated representative.* The bond resolution stated that the bond trustee, *i.e.,* Chemical Bank, was to represent all bondholders.[5] Chemical Bank has

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[5] The bond resolution provided, inter alia:

"Section 11.4. Suits by Bond Fund Trustee; Direction of Action by Bondholders; Possession of Projects; Receivership; Relinquishment of Control. If an Event of Default shall happen and shall not have been waived or remedied, then and in every such case the Bond Fund Trustee, either in its own name or as trustee of an express trust, or as attorney in fact for the holders of all the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, by its agents and attorneys, shall be entitled and empowered to proceed forthwith to institute such suits, actions and proceedings at law or in equity for the collection of all sums due in connection with the Bonds and to protect and enforce its rights and the rights of the holders of the Bonds under the Resolution for the specific performance of any covenant herein contained, or in aid of the execution of any power herein granted, or for an accounting against the System as trustee of an express trust, or in the enforcement of any other legal or equitable right as the Bond Fund Trustee, being advised by counsel, shall deem most effectual to enforce any of its rights or the rights of the holders of the Bonds, or to perform any of its duties under the Resolution. The

served in this capacity for the entire history of this action, and vigorously pressed the bondholders' claims. Under these circumstances, the bondholders must abide by the results obtained by their designated representative. Finally, the claims intervenors raise pertain to the securities' action that is now being tried in federal court. For relief on those claims, the intervenors should seek relief in that forum. As to the contract actions, we hold that the designated representative has fulfilled the representative function contemplated by the intervenor statutes. The motion to intervene is therefore denied.

C. Scope of Judgment

Appellants contend the summary judgment order entered by the court in this case exceeded the scope of their declaratory judgment action. Chemical Bank's complaint sought

> a determination that the Supply System was obligated to make payments to the bond holders and that the Participants were obligated to make payments to the Supply System under the terms of the Participants' Agreement.

Oral Decision, August 17, 1983.

Bond Fund Trustee shall be entitled and empowered, either in its own name or as a trustee of an express trust, or as an attorney in fact for the holders of the Bonds and the coupons appurtenant thereto, or in any one or more of such capacities, to file such proof of debt, amendment of proof of debt, claim, petition or other document as may be necessary or advisable in order to have the claims of the Bond Fund Trustee and of the holders of the Bonds and of the coupons appurtenant thereto allowed in any equity, receivership, insolvency, bankruptcy, liquidation, readjustment, reorganization or other similar proceedings relative to the System. For this purpose the Bond Fund Trustee is hereby irrevocably appointed the true and lawful attorney in fact of the respective holders of the Bonds and of the coupons appurtenant thereto (and the successive holders of the Bonds and of the coupons appurtenant thereto by taking and holding the same shall be conclusively deemed to have so appointed the Bond Fund Trustee) with authority to make and file in the respective names of the holders of the Bonds and of the coupons appurtenant thereto any such proof of debt, amendment of proof of debt, claim, petition or other document in any such proceedings, and to receive payment of any sums becoming distributable on account thereof, and to execute any such other papers and documents . . ."

Chemical Bank now asserts that its original pleadings sought only a judicial determination of the relationship between the parties, rather than an affirmative claim of relief. This argument is without merit. First, this theory ignores Chemical Bank's own expansion of the scope of the first action. In that action, Chemical Bank moved for summary judgment on a variety of issues. When summary judgment was granted in its favor on these issues, Chemical Bank did not allege that the order exceeded the proper scope of the pleadings.

Moreover, by expanding proceedings with their original summary judgment motion, Chemical Bank invited a determination of the parties' entire legal obligations. Chemical Bank cannot now complain that the determination against them was improper.

II

Contractual Obligations

A. Statutory Authority

As noted above, appellants first substantive challenge is to this court's prior conclusion that the Washington municipalities and PUDs did not have statutory authority to enter into these agreements. Before addressing their specific arguments, a brief statutory review is in order.

This statutory authority issue involves 28 participants: 19 PUDs and 9 Washington cities of various classes. One category of relevant statutes grants these 28 participants authority to purchase electricity. PUDs are granted with authority under the terms of RCW 54.16.040, which provides:

> A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for

> the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof. . . .

Each class of municipal participant has similar grants of authority to purchase electricity. *See, e.g.,* RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); RCW 35A.80.010.

The statutory provisions creating WPPSS grant an additional layer of statutory authority to purchase electricity. Those statutes allow creation of a joint operating agency which "shall have authority" (1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any or all such purposes (RCW 43.52.300(1)); (2) to construct, condemn, purchase, lease, acquire, operate, develop and regulate facilities for the generation of electric energy (RCW 43.52.300(2)); (3) to enter into contracts for sale, exchange, transmission or use of electric energy (RCW 43.52.300(3), (4)); and (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to so do (RCW 43.52.300(7)). These statutes are to be liberally construed to effectuate their purposes. RCW 43.52.910.

A second category of statutes grants cities and PUDs authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44. RCW 54.44.020 states that the utility or city "shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and

construction thereof and shall own and control a like percentage of the electrical output thereof." RCW 54.44.030 limits a participant's liability to its own acts and forbids the participant from assuming any of the other participants' debt or obligation.

Cities and PUDs may also construct energy facilities on their own. RCW 35.92.050 authorizes a city or town to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity. PUDs have similar authority to construct generating facilities under RCW 54.16.040.

After reviewing the participants' agreement in relation to those statutes, we concluded in *Chemical Bank* I that

> this agreement does not satisfy the statutory scheme governing the public participants. (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retained no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy."

Chemical Bank I, at 798-99.

Appellants attack this conclusion, arguing that the court did not address important facts which established control and, alternatively, that the issue of ownership control is a factual one which requires a full hearing on the merits.

Appellants first argue that all participants had statutory authority. As the critical issue to establish statutory authority is

control over the project, appellants cite several of the provisions of the participants' agreement to support their theory that the participants exercised control sufficient to establish statutory authority over the projects. We recognize that the agreement did supply some control but still disagree with appellants' position that it was control sufficient to protect the interests of their ratepayers as contemplated by these statutes.

Our conclusion is based upon the reasons set out in *Chemical Bank* I. Also, additional evidence of the limited control exercised by respondents can be gleaned from comparing the more complete indicia of ownership and, therefore, control present in the agreement between Pacific Power & Light Company (Pacific Power) and WPPSS. Pacific Power, as a 10 percent owner of WNP 5, was, by virtue of its ownership agreement, given significant rights over and above those granted to the participants. For instance, while the participants usually had to request information, WPPSS was obligated to keep Pacific Power informed on all significant matters, to confer with it prior to developing proposals and to furnish "any and all other information relating to the planning, construction, operation or maintenance of the Project." Pacific Power & WPPSS Ownership Agreement § 3(a).

Moreover, where the participants' agreement gave respondents rights to affect proposed WPPSS actions, any proposal submitted by WPPSS to Pacific Power had to include itemized cost estimates and all supporting reports and analyses. § 3(c). Rather than a 15-day take-it-or-leave-it provision applicable to the participants, Pacific Power was given 30 days to approve proposals, and certain matters could not proceed without Pacific Power's approval. § 3(d). These included changes in any of the following: site, type of steam supply system, architect-engineer or construction manager. § 3(e). Disputes between WPPSS and Pacific Power were to be resolved in the same manner as those between WPPSS and the participants. § 4(e). The ownership contract, unlike the PA, also specifically required WPPSS to award contracts in a cost effective fashion. Finally, Pacific Power's approval was re-

quired on any contract in excess of $500,000. § 7(e). The participants' approval, on the other hand, was required only on those contracts in excess of $2 million.

In summary, the Pacific Power and WPPSS ownership agreement gave greater control to Pacific Power than that granted to the participants. Our reevaluation of the statutory authority question thus leads us once again to the conclusion that the participants' agreement did not grant ownership control as contemplated by this statutory scheme. No statutory authority, therefore, existed.

Moreover, we reject appellants' assertion that the question of ownership control is essentially a factual inquiry. The participants' agreement and Pacific Power's ownership agreement create the contractual rights of the parties. Interpretation of those agreements is a question of law. *Kelly v. Aetna Cas. & Sur. Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983).

Appellants next contend that the agreements were a valid exercise of authority under the joint operating statutes. They offer three arguments. They assert, first, that recent amendments to the statutes demonstrate legislative recognition of the municipalities' authority, citing RCW 43.52.410, which states that no city or district may enter into a contract "to purchase or participate in a portion of an electrical generating project." Appellants conclude that this amendment is a legislative recognition and therefore ratification of these debts. Next, appellants cite an amendment to RCW 43.52.550 which now provides for a repayment provision for contracts such as these. Third, appellants urge that the narrow construction the court placed on the joint operating statutes defeats their purpose.

Respondents note that appellants' arguments ignore RCW 54.44 which provides specific mechanisms for constructing nuclear plants. As discussed in detail in *Chemical Bank* I, we agree. In addition, we find appellants' attempts to find authority in the above-cited amendments to be, at best, a strained interpretation of those statutes. Nothing in the legislative history cited by appellants or the statutes themselves specifically authorizes these contracts. At most, the amend-

ments represent a legislative attempt to provide orderly repayment *if* the utilities are found to be liable for the debts. That conclusion does not logically include the proposition that the debts themselves were valid.

Appellants next contend the court erred in concluding that these contracts were not contracts to purchase electricity. Citing cases from two other states, they urge that these statutes, providing for purchase of electricity, are to be construed broadly. This issue was adequately addressed in *Chemical Bank* I and will not be repeated here. Similarly, arguments pertaining to legislative interpretation and implied powers were raised previously. Appellants offer no compelling reasons to alter our decision on these points.

Finally, it has been argued that the court in *Chemical Bank* I ignored the broad general powers granted to cities under article 11, section 11 of our state constitution. This argument is not persuasive. First, the argument has no application to two-thirds of the participants governed by our original decision. Those participants are public utility districts and consequently do not come within the terms of Const. art. 11, § 11. Second, the argument improperly suggests that the general powers of a city may be exercised in derogation of specific statutory schemes.

Article 11, section 11 itself contemplates this limitation in that it allows cities to make only such regulations "as are not in conflict with general laws." Here, the Legislature developed extensive legislation governing the authority of cities and public utility districts to enter into contracts for the purchase of electricity and the ownership of generating plants. As discussed in *Chemical Bank* I, those statutes contained safeguards to protect ratepayers which were ignored. Those safeguards cannot now be subverted by misplaced reliance on general constitutional provisions.

In summary, we find that appellants' "new" arguments for statutory authority are unpersuasive. Our prior decision is therefore affirmed.

B. Ratification

Appellants' argument that the Legislature subsequently ratified these agreements is equally without merit. As a general rule, ratification requires that the act to be ratified be specifically acknowledged by the ratifying legislation. *See generally* E. McQuillin, *Municipal Corporations* § 29.10 (3d ed. 1981).

The amendments cited by appellants contain no such acknowledgment. Moreover, we cannot adopt appellants' suggestion that the amendments *infer* ratification. Ratification by inference is an ambiguous rule and dangerous doctrine requiring that a court second guess the Legislature. This we decline to do.

C. Contractual Obligation of Remaining Respondents

Appellants' next challenge is to the trial judge's order granting summary judgment in favor of those utilities whose contractual obligations were not before the court in *Chemical Bank* I.

Out of the total of 88 participants, 28 are governed by the statutory scheme described above. Since we had concluded that these utilities were not acting within the scope of their authority, the trial judge on remand was faced with the question of what effect release of the municipalities and PUDs had on the obligation of the remaining utilities. On respondents' motion for summary judgment, the judge ruled that the doctrines of failure of condition, precedent, commercial frustration or impossibility and mutual mistake all applied. These doctrines, the judge concluded, released the remaining participants' contractual obligations.

Appellants challenge this order, arguing that the trial judge's decision ignores the plain language of the contract and the applicable law. We agree that the trial judge incorrectly relied on the condition precedent analysis, but find that the doctrines of mutual mistake and commercial frustration both support his conclusion that the remaining participants were not obligated under the contract.

1. *Failure of Condition.* The Restatement (Second) of Contracts § 224 (1981) defines a condition as an event not certain to occur which must occur before performance under a contract becomes due. An event may become a condition by agreement or may be a term supplied by the court. § 226. The trial judge ruled that section 3 of the participants' agreement created a condition precedent to the formation of the contract. That section states that

> This Agreement shall be effective upon execution and delivery of Participants' Agreements by Supply System and Participants whose Participants' Preliminary Shares total 1.0 [100%] or more.

PA § 3. From this, the trial judge reasoned that the 100 percent (or substantially that) of the participants were required to have authority to enter into the contracts before a duty to perform could be imposed on any participant. We disagree. Section 3 does not establish authority to enter into the contract as a condition precedent to the obligation of all. Section 3 states simply that the contract takes effect when the participants' agreements are executed. Authority to enter into the contract is not mentioned in this section and was thus not made a condition precedent to the participants' obligation.

Furthermore, respondents' attempt to establish statutory authority as a condition of the contract conflicts with the accepted definition of the word "condition". The question of authority does not involve an event not certain to occur but rather a status of certain parties at the time they entered into the contract. For this reason, and that above, we conclude the trial judge erred in viewing section 3 of the participants' agreement as a condition.

2. *Commercial Frustration—Impossibility.* Respondents assert that section 3 of the participants' agreement contemplates 100 percent participation as a material part of the contract. They urge that this court's decision to excuse 28 participants, whose obligation was 70 percent of the total power shares,

should result in the contractual release of the remaining participants under the doctrine of commercial frustration or impossibility. We agree.

Both the Restatement (Second) of Contracts and our case law recognize commercial frustration and impossibility as independent legal theories that may, on occasion, excuse a party's contractual obligations. Recently, this court recognized and applied commercial frustration. *Weyerhaeuser Real Estate Co. v. Stoneway Concrete, Inc.*, 96 Wn.2d 558, 562, 637 P.2d 647 (1981).

> The doctrine of commercial frustration may be summarized as follows:
>
> > Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promissor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.
>
> Restatement of Contracts § 288, at 426-27 (1932). *See also* 18 S. Williston, *Contracts* § 1954 (3d ed. 1978); 6 A. Corbin, *Contracts* §§ 1355, 1356 (1962).

To finance, build or terminate these plants, the municipality and PUD participants were vital. Their share of the projects represents approximately 70 percent of the total obligation. Our decision in *Chemical Bank* I excused these obligations. As the remaining participants did not in any way contribute to this frustration of purpose, we believe contractual release of their obligation is required.

3. *Mutual Mistake.* The trial judge also held that the participants could be excused because all parties were mistaken about the authority of the municipalities. This court applied the doctrine of mutual mistake in *Simonson v. Fendell*, 101 Wn.2d

88, 91, 675 P.2d 1218 (1984). The court described the doctrine's requirements:

> A party seeking to rescind an agreement on the basis of mutual mistake must show by clear, cogent and convincing evidence that the mistake was independently made by both parties. *Beaver v. Estate of Harris,* 67 Wn.2d 621, 409 P.2d 143 (1965); *Carson v. Isabel Apartments, Inc.,* 20 Wn. App. 293, 296, 579 P.2d 1027 (1978). A mistake is a belief not in accord with the facts. Restatement (Second) of Contracts § 151 (1981).

Restatement (Second) of Contracts § 152 (1981) notes that a contract is voidable for mutual mistake when

> (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
>
> (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

We find that the assumption that the municipalities and PUDs had statutory authority was a mistaken assumption material to the contract. As discussed later in this opinion, all parties assumed that statutory authority existed. Moreover, the 60 respondents involved in this issue did not assume the risk that no authority existed. If anyone assumed the risk under the terms of section 154,[6] the bondholders did so. They were in a

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[6] "A party bears the risk of a mistake when

"(a) the risk is allocated to him by agreement of the parties, or

"(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

"(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154 (1981).

position to obtain judicial determination of the authority question, and did not seek such resolution. We conclude release of the 60 respondents is therefore warranted.

III

Availability of Equitable Remedies

Before discussing the equitable obligations of the parties, however, we believe this remedy, as well as the other equitable claims against the *Chemical Bank* I respondents, must be placed in historical perspective.

A. Equity's History

Both sides to this dispute seek the equitable result, but what is equity? One commentator notes that the term is used in two distinct senses. In the first, the word implies right, justice or moral quality. D. Dobbs, *Remedies* § 2.1, at 24 (1973). In another related judicial sense, the word refers to "what was once an entirely separate body of judicial rules, procedures, remedies, and to the separate courts that administered this juridical mass." D. Dobbs, at 24.

B. Types of Equitable Remedies

1. *Estoppel.* Estoppel existed at common law as the principle that a person who asserted a state of affairs should not be allowed to deny the existence of that state thereafter. Equity extended this doctrine. J. Lewis, *Outlines of Equity* 100 (1968). The extension was adopted by the common law; and, by the 19th century both English law and equity held that there would be estoppel where:

(a) there had been a representation by words or conduct,

(b) of existing fact, as opposed to law, which was

(c) intended to be acted upon, and

(d) was acted upon to his detriment by the person to whom it was made.

J. Lewis, at 100.

English legal history recognized two distinct forms of estoppel: promissory estoppel and estoppel by acquiescence. Promissory estoppel in England has been described as follows:

> Where by words or conduct a party to a transaction makes an assurance to the other which—
>
> (a) is intended to affect the legal relationship existing between them; and
>
> (b) is acted upon by the other party who thus alters his position to his detriment;
>
> the first party will not be allowed to behave in a manner inconsistent with his assurance. Having given his promise he is estopped from denying its validity.

J. Lewis, at 101.

A second type of estoppel found in English cases, estoppel by acquiescence, may arise "where a person incurs expenditure, or otherwise prejudices himself, in the belief, actively or passively encouraged by the other, that he had or would obtain a sufficient interest in the property to justify such expenditure." J. Lewis, at 102. This form of estoppel can be used not only as a defense but also as a right of action. J. Lewis, at 102.

Estoppel in American case law is well established but unevenly analyzed. It appears that several forms of estoppel exist. Like its English counterpart, estoppel in American case law has been sometimes limited to defensive use and sometimes used affirmatively.

First, American courts, including Washington's, recognize promissory estoppel. It is defined in Restatement (Second) of Contracts § 90(1) (1981):

> (1) A promise which the promissor should reasonably expect to induce action or forebearance on the part of the

> promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Unlike its British equivalent, however, the Restatement does not limit promissory estoppel to use as defense. Nor has Washington's case law done so. *See Klinke v. Famous Recipe Fried Chicken, Inc.,* 94 Wn.2d 255, 616 P.2d 644 (1980).

Second, Washington courts discuss equitable estoppel.[7] In *Klinke,* this court described both promissory estoppel and equitable estoppel:

> Equitable estoppel is based upon a representation of existing or past facts, while promissory estoppel requires the existence of a promise. Equitable estoppel also is available only as a "shield" or defense, while promissory estoppel can be used as a "sword" in a cause of action for damages. Promissory estoppel based on Restatement of Contracts § 90 (1932) has long been recognized in this state and may serve as the basis for an action for damages.

(Footnotes and citations omitted.) *Klinke,* at 258-59. Professor Dobbs, in *Remedies* 2.3 (1973), agrees equitable estoppel may be used only as a defense. He notes "estoppel is, according to the usual statement, a shield, not a sword. It does not furnish a basis for damages claims, but a defense against the claim of the stopped party." D. Dobbs, at 42.

Not all Washington cases have strictly adhered to this rule. For instance, in *Beggs v. Pasco,* 93 Wn.2d 682, 611 P.2d 1252 (1980), this court acknowledged that the doctrine of estoppel

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[7] Appellants, who rely on this theory, view equitable estoppel as containing three elements: (1) an admission, statement or act inconsistent with the claim thereafter asserted; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party arising from admission. *Beggs v. Pasco,* 93 Wn.2d 682, 611 P.2d 1252 (1980). Brief of appellant WPPSS, at 57-58. As discussed above, however, we find the concept more complicated than as represented by appellants.

applied to municipalities and then applied it in what appears to be an affirmative manner.[8] Moreover, many cases mingle promissory estoppel with equitable estoppel. *See State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947).

Third, a specialized form of estoppel arises in a series of bond cases decided by our court and the United States Supreme Court at the end of the last century. This form of estoppel, which for clarity's sake we will term estoppel by recital, prohibits a municipality from denying the validity of its bonds under specific circumstances. As these cases are factually similar to the one at hand, a closer look at this form of estoppel is warranted.

One of the early estoppel by recital cases is *Coloma v. Eaves*, 92 U.S. 484, 23 L. Ed. 579 (1875). In *Eaves*, the Court affirmed judgment for a plaintiff who purchased bonds from a municipal corporation. The bonds stated that they had been issued under and by virtue of the law of the state and in accordance with a vote of the electors of the township. In finding for the plaintiff, the Court noted that a bona fide purchaser was not obligated to look beyond such recitals. The Court quoted, with approval, the following rule from *St. Joseph Township v. Rogers*, 83 U.S. (16 Wall.) 644, 21 L. Ed. 328 (1872):

> "Power to issue bonds to aid in the construction of a railroad is frequently conferred upon a municipality in a special manner, or subject to certain regulations, conditions, or qualifications; but if it appears by their recitals that the bonds were issued in conformity with these regulations, and pursuant to those conditions and qualifications, proof that any or all of these recitals were

[8] A close examination of *Beggs v. Pasco, supra*, however, reveals that the court's conclusion that the city was estopped from denying statutory retirement benefits to the plaintiffs came *after* the court concluded that the unchallenged findings of fact placed plaintiffs squarely within the terms of the statute. *Beggs*, at 688. Consequently, the affirmative relief provided by the court was based upon the statute, not the doctrine of estoppel.

> incorrect will not constitute a defence for the corporation in a suit on the bonds or coupons, *if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification, which it is alleged was not fulfilled.*"

(Italics ours.) *Eaves,* at 492. In subsequent cases, the Court reaffirmed this rule, applying it even when the bonds were issued in excess of a municipality's constitutional debt limit. *See Gunnison Cy. Comm'rs v. Rollins,* 173 U.S. 255, 43 L. Ed. 689, 19 S. Ct. 390 (1898). *Accord, Cuddy v. Sturtevant,* 111 Wash. 304, 190 P. 909 (1920).

In explaining its rationale, the Court in *Gunnison* noted that the rule depended on who makes the recitals and whether their position justifies the public's reliance. The Court noted:

> If the officers authorized to issue bonds, upon a condition, are not the appointed tribunals to decide the fact, which constitutes the condition, their recital will not be accepted as a substitute for proof. In other words, where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive. *The very ground of the estoppel is that the recitals are the official statements of those to whom the law refers the public for authentic and final information on the subject.*"

(Italics ours.) *Gunnison,* at 267 (quoting *Dixon Cy. v. Field,* 111 U.S. 83, 28 L. Ed. 360, 4 S. Ct. 315 (1884)).

In addition to promissory estoppel, equitable estoppel and estoppel by recital, our case law has applied the concept to foreclose denial of certain facts or representations. To prevent injustice then, the court has evoked estoppel in pais, estoppel by misrepresentation, and laches. (*See generally Arnold v. Melani,* 75 Wn.2d 143, 147, 437 P.2d 908 (1968) and cases cited therein.) The multiplicity of these terms has obscured rather

than clarified the law, however, and is of dubious applicability to this case. We prefer, therefore, to confine our discussion to the three forms of estoppel clearly recognized by the courts and the Restatements as separate doctrines and to the theory of unjust enrichment discussed below.

2. *Unjust Enrichment.* Just as the term "estoppel" has been used widely to describe a variety of legal actions, the term "unjust enrichment" is equally amorphous.

John Dawson notes that, in the English common law, relief for unjust enrichment can be found under many different names, including remedies for disseisin of land, the quid pro quo requirement in an action for debt and remedies in equity for enforcing trust or canceling transfers for fraud and duress. J. Dawson, *Unjust Enrichment* 9 (1951). Relief for unjust enrichment is frequently called restitution. Restitution will be granted in a variety of circumstances, including those involving contractual relief for mutual mistake or commercial frustration. *See* Restatement (Second) of Contracts § 272 (1981), *Simonson v. Fendell,* 101 Wn.2d 88, 675 P.2d 1218 (1984).

We turn now to the application of general principles of equity to the specific facts of this case.

C. Application of Doctrines

1. *Equitable Estoppel.* As previously suggested, appellants contend that the general principle of equitable estoppel applies to their case because the participants made representations which were relied upon by the bondholders and resulted in injury. We need not decide whether equitable estoppel may properly be used in an affirmative manner, as we conclude the doctrine is inapplicable. First, although equitable estoppel is sometimes applied to municipal corporations, such application is not favored. *PUD 1 v. Cooper,* 69 Wn.2d 909, 918, 421 P.2d 1002 (1966). This disfavor has led courts to conclude that to establish equitable estoppel, every particular must be proven by the plaintiff with clear, cogent and convincing evidence. *PUD 1 v. Cooper, supra.* We believe that plaintiffs have not met this burden.

We find the doctrine is inapplicable because the representations relied upon by the bondholders were representations as to questions of law, not questions of fact. As such, the bondholders should have resorted to a declaratory judgment action to determine the issue of authority. Further, even if the representations are factual, the doctrine of equitable estoppel will not be applied where both parties have the same opportunity to determine the truth of those facts. Consequently, we have observed:

> In order to create an estoppel it is necessary that:
>
> "The party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, *but was also destitute of any convenient and available means of acquiring such knowledge; and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.*" 11 Am. & Eng. Ency. Law (2d ed.), p. 434.

(Italics ours.) *Leonard v. Washington Employers, Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969) (*quoting Wechner v. Dorchester*, 83 Wash. 118, 145 P. 197 (1915)).

As suggested earlier in the opinion, the question of statutory authority could and should have been resolved in a declaratory judgment action. As this was not done, the parties cannot now complain of the consequences of their neglect in the matter. For the same reason, we find that the participants are not estopped by their recitals in the bonds.

2. *Estoppel by Recital.* Estoppel by recital, (discussed above) leads us to the conclusion that the doctrine is a limited concept applied in very narrow circumstances. There are three requirements for the doctrine's application. First, the municipality must have authority to enter into the transaction. *See South Ottawa v. Perkins*, 94 U.S. 260, 24 L. Ed. 154 (1876). Second, if the plaintiff seeks to establish estoppel based on recitals in a bond, the individual or entity making such recitals

must be both authorized to make those recitals, and one on whom the public should be entitled to rely for the truth of the representation. *Gunnison Cy. Comm'rs v. Rollins, supra.* Third, the recital, as in the equitable estoppel cases, must be one concerning facts rather than law. Appellants' case meets only one of these three requirements. Although the municipalities did have general authority to enter into the transactions, we find that the participants are not the final authority on the question of statutory interpretation created by these contracts, and that the representation was legal rather than factual. Those issues in this case are factual and are properly the jurisdiction of a court of law. We conclude that the doctrine of estoppel by recital, as developed in the last century, should not be applied here.

3. *Statutory Estoppel—RCW 62A.8.* Both appellants offer the provisions of article 8 of the Uniform Commercial Code in support of their theory that our statutes prohibit participants from denying payment on these obligations. The trial judge rejected this argument because he believed it was precluded by *Chemical Bank* I. This conclusion is not required by our decision. Thus, a detailed analysis of the issue is in order.

This argument arises from the court's repeated reference to the municipal participants as guarantors. In *Chemical Bank* I, the court repeatedly stated that the agreement was essentially an unconditional guaranty of payment. *Chemical Bank* I, at 784, 786, 798. RCW 62A.8-201(2) provides that a "guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security." The conclusion that a guarantor is an issuer is important because it triggers the provisions of RCW 62A.8-202. That section provides:

> (1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and those made part of the security by reference to another instrument, indenture or document or to a constitution, statute, ordinance, rule, regulation, order or the like to the extent that the terms so referred to do not conflict with the stated terms. Such a reference does not of itself charge a

purchaser for value with notice of a defect going to the validity of the security even though the security expressly states that a person accepting it admits such notice.

(2) (a) A security other than one issued by a government or governmental agency or unit even though issued with a defect going to its validity is valid in the hands of a purchaser for value and without notice of the particular defect unless the defect involves a violation of constitutional provisions in which case the security is valid in the hands of a subsequent purchaser for value and without notice of the defect.

(b) The rule of subparagraph (a) applies to an issuer which is a government or governmental agency or unit only if either there has been substantial compliance with the legal requirements governing the issue or the issuer has received a substantial consideration for the issue as a whole or for the particular security and a stated purpose of the issue is one for which the issuer has power to borrow money or issue the security.

RCW 62A.8-202(1), (2). Comment 6 to the rule states that the rule is based on the estoppel by recital cases discussed above. The Washington comment to this section states that the statute has substituted two criteria for the recital requirement. First, there must be substantial compliance with the statute's governing issue. Second, the municipality must have received substantial consideration and the stated purpose must be within the power of the issuer. *See* Comment, RCWA 62A.8-202.

Respondents assert that this statute is inapplicable. They first argue that the participants are not issuers. Several theories are offered to support this proposition, none of which we find persuasive. They allege, for instance, that the participants are not guarantors because the only basis for finding a guarantor relationship is the participants' agreement which this court has already ruled invalid. Respondents' arguments are circular and not supported by authority.

Respondents' next argument for evading the terms of RCW 62A.8-202(2)(b) is that no securities have been challenged, because everyone admits the validity of the bonds. Respondents have repudiated only the participants' agreement, and this agreement has already been determined not to be a security by the trial judge. Because this conclusion was not challenged on appeal, respondents assert that it is now the law of the case. This argument is appealingly simple. It ignores, however, the history of this case which, originally, came to this court on discretionary review of an interlocutory order. As such, appellants were not obligated to appeal every adverse decision against them. Furthermore, this court narrowly tailored the issues on review in *Chemical Bank* I. Thus, it would be unjust to preclude the argument on procedural grounds. Respondents' argument is therefore rejected.

Nonetheless, we agree that the PA does not fall within the terms of RCW 62A.8-202. We conclude the PA does not meet the statute's definition of a security. RCW 62A.8-102 defines the word security very narrowly. It states:

> (1) In this Article unless the context otherwise requires
>
> (a) A "security" is an instrument which
>
> (i) is issued in bearer or registered form; *and*
>
> (ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; *and*
>
> (iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; *and*
>
> (iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

(Italics ours.)

The participants' agreements are not issued to a bearer, they are not registered or commonly dealt in as a medium for investment, and are not one of a class. In fact, of the above requirements, only (iv) applies to the participants' agreement. Appellants argue, nonetheless, that the participants' agreement was an integral component of the bonds and therefore should be considered as falling within the parameters of this statute. Appellants cite no case authority[9] for this proposition and offer no compelling policy reasons for extending the definition of security to this agreement.

We conclude that the participants' aqreement does not meet this definition. RCW 62A.8-202 is therefore inapplicable.

D. Unjust Enrichment

As noted above, a party must make restitution when he has been unjustly enriched at the expense of another. Restatement of Restitution § 1 (1937). The Restatement (Second) of Restitution § 1 (Tent. Draft No. 1, 1983) contains a slightly different formulation of this general principle. It states:

> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Each of these statements, however, involves the transfer of benefit from one party to another. It does not require, as respondents infer, that the benefit still exist. As noted in comment *b* to the Restatement of Restitution § 1 (1937),

> [a] person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to

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[9] Appellants cite RCW 62A.8-201(2) to support their allegation that the participants' agreement is part of the security. That section states:

> (2) With respect to obligations on or defenses to a security a guarantor is an issuer to the extent of his guaranty whether or not his obligation is noted on the security.

This section does not address, however, a situation where, as here, the invalidity is in the separate agreement rather than the security. We decline, therefore, to read this section as suggested by appellants.

> or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit," therefore, denotes any form of advantage.

Restatement, at 12.

The definition of benefit is critical to appellants' argument because respondents allege that the bondholders did not confer a benefit on the participants. This argument and the related question of whether justice requires restitution in this case will be addressed later in the opinion. We turn first, however, to an argument which pertains only to those respondents whose contractual obligations were held to be ultra vires by our decision in *Chemical Bank* I.

Respondents, citing 10 E. McQuillin, *Municipal Corporations* § 29.04 (1981) and *Finch v. Matthews,* 74 Wn.2d 161, 443 P.2d 833 (1968), contend that the unjust enrichment theory cannot be applied against a municipality where the acts are substantively ultra vires. We agree and, for the reasons set out below, find the acts substantively ultra vires.

A substantive/procedural dichotomy appears in virtually every ultra vires case.[10] The general rule, stated most recently in *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982), states that a private party, acting in good faith, may recover from a governmental agency if the agency "had the power it sought to exercise but merely . . . exercised it in an irregular manner or by unauthorized procedural means", and the action was not malum in se, malum prohibitum or manifestly against public

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[10]As noted throughout this opinion, courts often grant relief against a municipality under the various equitable theories discussed above. Each equitable doctrine seems to adopt this procedural versus substantive dichotomy, however. Thus, though the discussion of the distinction is contained in this section of the opinion, the conclusion that the acts were only procedurally ultra vires applies to the other theories herein discussed.

policy. *Noel,* at 381. Not surprisingly, both sides assert that this rule supports their position. Appellants argue that the municipalities had broad general statutory authority to enter into contracts for purchase of electricity and generating plants. They conclude that the only error was a procedural one, that is, the contracts did not clearly set out a sufficient ownership interest to protect ratepayers. Respondents counter with the allegation that *Chemical Bank* I already decides the issue of whether the contracts were procedurally or substantively ultra vires.

We believe the instance case falls within this rule. As we concluded in *Chemical Bank* I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." *Chemical Bank* I, at 799. If the contracts had been for these purposes, the participants would have had statutory authority. They were not. The doctrine of substantively ultra vires activity thus precludes recovery.

As noted above, a Restatement's definition of benefit is quite broad. Thus, our task here is to determine whether any asserted benefits fall within this definition. We conclude they do not.

We find persuasive respondents' theory that the benefits of the bond revenues flowed to WPPSS and no further. WPPSS contracted with the bondholders, received their money and appropriated it for its purposes. We can see no benefit to the participants in these circumstances.

In summary, we find no benefit passed to the respondents and, thus, justice does not require restitution. Moreover, restitution against those respondents released by our decision in *Chemical Bank* I is precluded because their activities were substantively ultra vires.

IV

Constitutional Claims

Appellants assert that the United States Constitution and the Washington State Constitution would be violated if they are denied relief. Appellants do not rely directly on any one

provision of the constitutions but instead extract general principles from cases under the contract clause, U.S. Const. art. 1, § 10, cl. 1; the takings clause, U.S. Const. amend. 14, § 1; and the due process clause, U.S. Const. amend. 14, § 1. Appellants' arguments depend upon reading the various clauses together. No case has done so. Moreover, authority cited in appellants' briefs do not support their theory. For instance, *Kaiser Aetna v. United States,* 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979) involved a simple application of the takings clause to action by the Federal government. Petitioner, Kaiser Aetna, leased and improved a private tidal pond which had no access to the ocean. After petitioner dredged the pond, created ocean access and a marina, the Federal government sought to enforce a public right of access to the pond. The Supreme Court held that this could not be done without compensation to petitioner. *Kaiser* thus supports only the proposition that the government may not take private property without compensation. Here, no taking occurred.

Likewise, the State has not impaired a contract obligation. When a city acts beyond its specific statutory authority, no contract obligation is created. The contract is void. *Chemical Bank* I.

Appellants' due process argument is equally unpersuasive. No cases have held that a court's ruling, as a matter of law, that a contract is unenforceable, violates due process. In summary, the rule suggested by appellants would effectively vitiate a court's ability to invalidate contracts. This we decline to do.

We find that the bondholders' interests have been adequately represented in this case. Their motion to intervene is denied. We reject appellants' attacks on our decision in *Chemical Bank* I and their equitable arguments. The trial judge's decision is affirmed.

WILLIAMS, C.J. and BRACHTENBACH, DORE, DIMMICK and PEARSON, J.J., concur.

UTTER, J. (dissenting)—I dissent from the majority's conclusion that this court should not review its holding reached in *Chemical Bank v. WPPSS* 99 Wn.2d 772, 663 P.2d 329 (1983). The provisions of RAP 2.5(c)(2) clearly authorize reconsideration.

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

The history of this rule indicates it was adopted by this court for precisely the situation we now face, a situation where adherence to the earlier ruling as the rule of the case would be both unwise and a perpetuation of earlier error. As of the date of this opinion, at least four scholarly publications have reviewed the court's initial opinion and all four are critical of its conclusion and the reasoning used to justify it. Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown,* 5 J. Energy *L. & Poly* 273 (1984); Comment, *Chemical Bank v. Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine,* 8 U. Puget Sound L. Rev. 59 (1984); Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes,* 59 Wash. L. Rev. 653 (1984); Note, *Chemical Bank v. Washington Public Power Supply System: The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations,* 69 Cornell L. Rev. 1094 (1984). Events occurring since publication of our first opinion make clear it will in no way spare the people of this state continuing costs of litigation and exposure to liability. On October 15, 1984, investors who bought bonds for WNP 4 and WNP 5 filed a claim for $7.25 billion against the State of Washington. The entire population of the state is now potentially liable, including those areas that specifically rejected participation.

The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event

they do, the United States Supreme Court should exercise its discretion and accept this case for review. Our court's action is similar to that taken by many state courts in the Reconstruction era which were reversed on constitutional grounds by the United States Supreme Court.

In *Gelpcke v. Dubuque,* 68 U.S. (1 Wall.) 175, 17 L. Ed. 520 (1863), the Supreme Court rejected the Iowa Supreme Court's refusal to enforce railroad bonds.

> [I]f the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.

Gelpcke, at 206. Many subsequent decisions during the Reconstruction era went even farther. *See generally* C. Fairman, *History of the Supreme Court of the United States,* 918-1116 (1971).

The Supreme Court continues to invoke the takings clause and the contracts clause to protect citizens from the transfer of private property to public purposes by governmental action. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980); *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983). In this century, most takings and contracts clause cases respond to legislative, not judicial action. Nonetheless the United States Supreme Court continues to recognize that state courts may not "redefine" as private what had been vested public rights. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. at 164 (restraining Florida Supreme Court from "transform[ing] private property into public property without compensation").

I

I disagree with the majority on a number of grounds in its ruling that the Washington public utility districts (PUD's) and Washington municipal participants lacked authority to enter into their respective agreements. Although it is difficult for this

court to admit it was in error in the largest case to come before this court in its history, we should do so now. By so doing we would let the normal legal processes resolve this dispute on the facts and the law which should be applied.

A

The majority opinion throws into confusion a body of municipal law carefully developed over many years prior to this case which granted to municipalities broad authority in the exercise of their police powers. This power to manage their own affairs, subject to broad legislative guidance, has been carefully built into our constitution, statutes and case law. Our own recent cases, not mentioned by either majority opinion, confirm this. *Issaquah v. Teleprompter Corp.*, 93 Wn.2d 567, 611 P.2d 741 (1980) and *United States v. North Bonneville*, 94 Wn.2d 827, 621 P.2d 127 (1980).

Prior to *Chemical Bank* I, this court liberally construed powers given to first class and code cities. *Winkenwerder v. Yakima*, 52 Wn.2d 617, 622, 328 P.2d 873, 878 (1958). RCW 35.20.900. In determining whether municipalities were given certain powers to act, we have liberally applied the "reasonable necessity test" where police power actions are involved. *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978); *Hunter v. North Mason High Sch.*, 85 Wn.2d 810, 817, 539 P.2d 845, 849 (1975).

By finding no express authority to enter into the participants' agreement in *Chemical Bank* I, this court did not comment on several earlier accepted rulings. In the majority opinion, first class and code cities were given the same restrictive interpretation of their statutory authority as were other cities. This is contrary to our own consistent line of earlier authority. *Winkenwerder v. Yakima, supra.*

The majority inadequately deals with our previous holdings which have placed actions involving public works within the liberally interpreted police powers of cities, counties and

towns. *Housing Auth. v. Seattle,* 56 Wn.2d 10, 15, 351 P.2d 117, 120 (1960); *Kaul v. Chehalis,* 45 Wn.2d 616, 625, 277 P.2d 352, 357 (1954); and *Morse v. Wise,* 37 Wn.2d 806, 810-11, 226 P.2d 214, 216 (1951).

The court in its majority opinion also erroneously interprets the legislative intent expressed in our statutes that authorize certain municipal corporations to construct, acquire and operate electric generating facilities. RCW 35.92.050 and 54.16.040. These statutes focus on control over the electricity produced, rather than on control over the facilities, as emphasized by the majority.

The legislative declaration requiring broad construction of joint operating agency statutes is ignored by the majority. *See* RCW 43.52.910. Instead, its opinion strictly construes RCW 43.52 to achieve what I believe is a nonexistent distinction between powers of a joint operating agency and powers of its participants. RCW 43.52.910.

I also disagree with that portion of the majority opinion dealing with implied statutory authority. Contrary to our general liberal interpretation of police power statutes, the court relied on taxation, not police power decisions, to hold that the test for implied powers is legal necessity instead of the fairly implied or reasonable necessity test. *See, e.g., Scott Paper Co. v. Anacortes,* 90 Wn.2d 19, 29, 578 P.2d 1292, 1298 (1978). Taxation cases are totally inapplicable inasmuch as they rely on different constitutional provisions than the police power cases. Const. art. 7, §§ 5, 9; art. 11, § 12. In *Hillis Homes, Inc. v. Snohomish Cy.,* 97 Wn.2d 804, 809, 650 P.2d 193, 195 (1982), the court required express statutory authority under the wording of article 11, section 12, a taxation provision. On the other hand, Const. art. 11, § 11 provides:

> Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.

This section is effective without legislative enactment and is a more direct grant of authority than that found in the taxation

sections. *Patton v. Bellingham,* 179 Wash. 566, 570, 38 P.2d 364, 365 (1934). This court's earlier attempt to distinguish *Municipality of Metro Seattle v. Seattle,* 57 Wn.2d 446, 460, 357 P.2d 863, 872 (1960) fails, due to its basic error which confuses tax cases with police power cases.

Serious questions remain regarding the impact of our decision, if unchanged, on future Washington law. Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes, supra* at 667-69. Any action not backed by the clearest express authority may well be found to be ultra vires. Legal opinions regarding municipal authority will be difficult to give and municipal projects, without legislative or judicial approval of municipal authority, difficult to market. Municipal corporations are deprived of the opportunity for innovative solutions to their problems in the absence of a clear expression of legislative or judicial approval. The decision provides a fertile ground for judicial challenge to major municipal undertakings and limits the ability of municipal corporations to work between themselves to solve their common problems. Declaratory judgment proceedings will increase, of necessity, adding to overcrowded court dockets, diversion of scarce judicial resources and increased cost to taxpayers of time and money.

Most seriously, municipal corporations will be required to increasingly ask for legislative clarification of their authority. Given the Legislature's limited schedule, significant time lags between identification of problems and legislatively authorized solutions will be commonplace.

B

There are some 28 Washington municipalities and PUD's as participants involved in Washington Public Power Supply System (WPPSS). The question of whether they had statutory authority to enter into their respective agreements was the subject of *Chemical Bank* I. Of these participants, 19 are PUD's and 9 are Washington cities of various classes. PUD's are granted authority to purchase electricity under the terms of

RCW 54.16.040.[1] Each class of municipal participant had similar grants of authority to purchase electricity. *See, e.g.*, RCW 35.23.440(44); RCW 35.24.290(3); RCW 35.27.370(4); and RCW 35A.80.010.

In addition to the previously cited authority, the statutes creating WPPSS add an additional layer of statutory authority to purchase electricity. Creation of a joint operating agency is authorized which "shall have authority" (1) to generate, produce, transmit, deliver, exchange, purchase or sell electric energy and to enter into contracts for any and all such purposes, RCW 43.52.300(1); (2) to construct, condemn, purchase,

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[1] RCW 54.16.040 provides:

"A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn and purchase, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam, or other methods, within or without its limits, for the purpose of furnishing the district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric current for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof, free from the jurisdiction and control of the utilities and transportation commission, in all things, together with the right to purchase, handle, sell, or lease motors, lamps, transformers and all other kinds of equipment and accessories necessary and convenient for the use, distribution, and sale thereof: *Provided,* That the commission shall not supply water to a privately owned utility for the production of electric energy, but may supply, directly or indirectly, to an instrumentality of the United States government or any publicly or privately owned public utilities which sell electric energy or water to the public, any amount of electric energy or water under its control, and contracts therefor shall extend over such period of years and contain such terms and conditions for the sale thereof as the commission of the district shall elect; such contract shall only be made pursuant to a resolution of the commission authorizing such contract, which resolution shall be introduced at a meeting of the commission at least ten days prior to the date of the adoption of the resolution; *Provided further,* That it shall first make adequate provision for the needs of the district, both actual and prospective."

lease, acquire, operate, develop and regulate facilities for the generation of electric energy, RCW 43.52.300(2); (3) to enter into contracts for sale, exchange, transmission or use of electric energy, RCW 43.52.300(3), (4); (4) to act as agent for the purchase and sale at wholesale of electricity for any city or district whenever requested to do so, RCW 43.52.300(7). The Legislature mandated that these statutes be liberally construed to effectuate their purposes. RCW 43.52.910.

A third category of statutes grants cities and PUD's the authority to enter into joint operating agencies for the purpose of developing nuclear power. RCW 54.44.020 requires that the utility or city

> shall own a percentage of any common facility equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction thereof and shall own and control a like percentage of the electrical output thereof.

That chapter also limits the participant's liability to its own acts and forbids the participant from assuming any of the other participants' debt or obligation. RCW 54.44.030.

A fourth category grants cities and PUD's authority to construct energy facilities on their own. They are authorized by RCW 35.92.050 to construct, condemn, purchase and acquire facilities for the purpose of furnishing the city or town or its inhabitants with electricity.

The court's opinion in *Chemical Bank* I reasoned that the participants' agreement with WPPSS failed to satisfy the statutory scheme governing public participants for a number of reasons. The majority held: (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retain no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal

services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy". *Chemical Bank* I, at 798-99.

I have previously stated why, as a matter of law, I believe the majority was incorrect. The majority in *Chemical Bank* I is also in error when it assumes, as a matter of fact, that ownership, or its equivalent in terms of control, did not exist under the facts of this case. At *Chemical Bank* I, pages 787-88, the majority, in referring to the complexity of budgets and construction decisions, states that it was "unlikely that a part-time committee . . . could provide significant input" and asserts that the participants' committee "apparently served as a rubber stamp".

For the majority to resolve these issues as factual conclusions violates Washington Constitution article 4, section 6 which gives to the trial courts the sole authority to decide factual issues.

> Factual disputes are to be resolved by the trial court. . . . The power of this court is appellate only, which does not include a retrial here but is limited to ascertaining whether the findings are supported by substantial evidence or not. If we were so disposed, but we are not, we are not authorized to substitute our judgment for that of the trial court.

Stringfellow v. Stringfellow, 56 Wn.2d 957, 959, 350 P.2d 1003 (1960).

The majority in *Chemical Bank* I, and today, incorrectly relies on *Kelly v. Aetna Cas. & Sur. Co.,* 100 Wn.2d 401, 670 P.2d 267 (1983) to justify this court's authority to resolve issues of ownership control by characterizing them as questions of law rather than fact. The interpretation of the participants' agreement, the majority asserts, is solely a matter of law. Its statement of the law contained in *Kelly* is incomplete, however, for the interpretation or legal effect of a contract is a matter of

law for the court *only* in the absence of disputed facts. *Yeats v. Estate of Yeats,* 90 Wn.2d 201, 580 P.2d 617 (1978); *Epperly v. Seattle,* 65 Wn.2d 777, 399 P.2d 591 (1965). *See generally* 4 S. Williston, *Contracts* § 616 (3d ed. 1961); 3 A. Corbin, *Contracts* § 554, 595 (1960 & Supp. 1984).

In *Kelly,* an insurance law case, the Washington Supreme Court found summary judgment appropriate where a complete factual record had been developed and no dispute other than the legal meaning of a term contained in an insurance policy existed. The court found the interpretation of the term "owner" to be a question of law. The decision in *Kelly* is consistent with the established legal principle that the interpretation of legal meanings of specific terms within insurance contracts is generally a question of law. *See Pacific Indem. Co. v. Bloedel Timberlands Dev., Inc.,* 28 Wn. App. 466, 624 P.2d 734 (1981); *see generally* E. Farnsworth, *Contracts* 515-517 (1982). In *Kelly,* we engaged in no weighing of evidence or trying of facts.

Unlike *Kelly,* the present case presents numerous factual disputes which go well beyond the mere legal definition of terms. Since numerous factual questions relating to the actual operation of the participants' agreement exist, consistency with both Washington contract and constitutional law requires that a full factual record be developed and that all factual disputes be resolved at the trial level.

Even if the majority correctly resolved the issues of ownership and control, however, it did not by so doing answer all of the necessary issues that remained before the court for decision. As a matter of statutory interpretation, not all the statutes pertaining to the PUD's and municipalities require ownership. Some, such as RCW 35.92.050, on their face authorize schemes similar to the participants' agreement. While the first portion of RCW 35.92.050 speaks to ownership interests, the statute also states that a city or town may

> authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity or power from either within or without the city or town for its

> own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

This provision was an integral part of Judge Coleman's decision at the trial level, is not adequately dealt with by the majority, and provides authority for the participants to act.

As another alternative, were this court to find the majority's conclusions in *Chemical Bank* I correct, appellants argue that, on the record, 20 of the participants had control by virtue of their membership in WPPSS. Those 20 participants represent 68 percent of the project's shares and held 88 percent of the voting power on WPPSS. As to these participants, the statutes governing WPPSS grant them both ownership and management control over the projects. *See* RCW 43.52.370 and 43.52.374 (management and control of joint operating agency vested in a board composed of member utilities and outside directors); RCW 43.52.360 (after dissolution, members hold assets as tenants in common). The majority in *Chemical Bank* I also failed to address itself to this argument. Given this degree of control over the projects by the large majority of the participants, this court was in error in concluding as a matter of law, without further factual inquiry, that these participants lacked sufficient control over the projects to protect their ratepayers.

Even if the majority's conclusion that the participants did not have an ownership interest in WNP 4 and WNP 5 was correct, the participants' committee provided the participants with a vehicle to exert their management control. Although I cannot disagree with the majority's determination that "the participants' committee apparently served as a rubber stamp for WPPSS' decisions," *Chemical Bank* I, at 788, courts have consistently recognized in securities litigation that investors who fail to exercise opportunities for control available to them cannot later claim they lacked control. *See, e.g., Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666 (10th Cir. 1972), aff'g 324 F. Supp. 460 (D. Colo. 1970). Absent documentation that their attempts to control debt exposure through the WPPSS participants committee were frustrated, this court and the

federal courts should not permit the participants to argue they had no management control.

For all the above stated reasons, I would affirm the summary judgment granted by the trial court in all respects. Our failure to find authority exists for the participants to enter into the agreements raises serious questions as to the basis upon which Washington nuclear power plants 1, 2 and 3 were built. These plants were built with the same basic agreements as those entered into by the participants WNP 4 and WNP 5, with the added benefit of net billing. If the participants did not have authority to enter into the agreements for plants 4 and 5, they could not now assert the right to participants' shares in a working plant. Such a conclusion could well force the Bonneville Power Authority to seize the participants' interests in plants 1, 2 and 3.

C

By ruling only on the authority issue, the court in *Chemical Bank* I did not address the other issues before the court in that case. The lower court's ruling should be discussed on these matters inasmuch as it was correct in every respect and the factual issues remaining to be resolved should proceed to trial.

The trial court did not abuse its discretion in deciding to strike the jury demand. Its reliance on *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 617 P.2d 704 (1980), was proper. There we noted, "[i]n determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse." *Brown*, at 368. The trial judge explicitly applied in his analysis the factors required in the *Brown* case. He first considered that the issues raised were an affirmative defense, but looked beyond the pleadings to the true nature of the allegations and concluded that this was, in fact, an action for rescission.

The court acted within its authority and no showing has been made that there was a reversible abuse of discretion. The record supports its conclusion that the participants' equitable

affirmative defense was to seek rescission of the contract and that this is not a case of a defendant attempting to destroy the right to a jury by asserting equitable defenses; that participants seek both equitable relief and a jury; that the main issues are equitable; that the equitable issues are complex; that only the equitable issues remain to be tried if the other aspects of its ruling are upheld; that the overall nature of the action is not doubtful; and lastly, that the real issues in dispute are equitable.

The trial court also properly determined that the liabilities incurred by the participants did not exceed statutory or constitutional debt limitations. The determinative issue is whether the participants' liabilities are a debt for constitutional debt limitation purposes. This court has defined "debt" in the context of article 8 to mean "borrowed money; it denotes an obligation created by the loan of money, usually evidenced by bonds but possibly created by the issuance of paper bearing a different label." *State ex rel. Wittler v. Yelle,* 65 Wn.2d 660, 668-69, 399 P.2d 319 (1965). We have in the past consistently held that the provisions of article 8, section 6 of the Washington Constitution do not apply under revenue financing conducted through the bases of the "special fund" doctrine. The rationale behind this exemption is that obligations payable not from general tax revenues but from a special fund are not debts of the municipality in a constitutional or statutory sense. *State ex rel. State Fin. Comm. v. Martin,* 62 Wn.2d 645, 661, 384 P.2d 833 (1963). The parties designed this revenue bond program to conform to the requirements of the special fund doctrine. The source of the payments on the bond are either (1) revenues generated from the projects, or (2) revenues pledged by participating public utilities. As such, according to our previous rulings, the participants' obligations do not fall within the constitutional or statutory debt limitations.

Finally, the trial court properly held that the contracts obligate the participants to pay costs of decommissioning in debt service. Decommissioning costs refer to payments to contractors for work done on the projects as well as payments to settle contracts interrupted when the projects were terminated. (Participants' Agreement (PA) § 13(a)(ii), at 36-37).

Debt service refers to the principal and interest payments to the bondholders.

To resolve whether the trial court correctly interpreted the obligation of the participants to pay the costs of decommissioning in debt service requires an examination of the participants' agreement and bond resolution. Interpretation of the agreement is governed by the fact that the projects were terminated pursuant to section 13 of the participants' agreement but that termination occurred prior to the completion of the projects. Project financing was structured so that payment sources depended upon whether the project was under construction, operating or terminated. There are three key definitions involved: "contract year"; "billing statement" and "annual budget".

"Contract year" as defined in the participants' agreement starts on the earliest of three dates: "(i) the earlier of the Dates of Continuous Operation of any of the Plants or (ii) on July 1, 1988, or (iii) the date one year after the date of termination of the Project as provided in Section 13". PA § 1(g), at 7. These trigger dates represent the possible commencement of participant payments. After the contract year begins, the monthly billing statement determines the amount to be paid the supply system by the participant. PA § 1(b), at 4-5. That amount is calculated by multiplying the participant's share by the amount of the annual budget less payments from other sources, and adding the cost of fuel. Finally, annual budget is defined as:

> "Annual Budget" means the budget adopted by Supply System pursuant to Section 8(b) with respect to the Projects and which itemizes the estimated costs of each Project, commencing with (i) the Date of Continuance Operation of the Plant related to such Project, or (ii) July 1, 1988, or (iii) the date one year after the date of termination of a Project as provided in Section 13, whichever is earliest, exclusive of costs of construction as defined in the Bond Resolution, and costs of fuel, applicable to the respective Contract Year . . . The Annual Budget, as amended from time to time, shall make provision for all such Supply System's costs, including accruals and amorti-

> zations, resulting from the ownership, operation and maintenance of the Projects, repairs, renewals, replacements, and additions thereto and costs of termination thereof as provided in Section 13, together with the amounts over or under billed in accordance with subsection (b) below. The Annual Budget shall include, but not be limited to, (i) the amounts which Supply System is required under the Bond Resolution to pay in each Contract Year into the various funds provided for in the Bond Resolution from the Revenue Fund, as therein defined, for debt service and all other purposes . . .

PA § 1(a), at 3-4.

Prior to the three possible trigger dates, which were (1) 1 year after the termination of the project; or (2) July 1, 1988, or (3) the date of continuous operation of a plant, payment of the project's costs were not made by participants. Instead, bond proceeds were used. However, after the so-called trigger dates, participant payments are required to begin through the annual budget.

The trial court correctly determined that under the applicable provisions of the participants' agreement, decommissioning costs are unequivocably included in the annual budget. The projects were correctly terminated pursuant to section 13 of the participants' agreement which requires WPPSS to begin decommissioning the projects and make monthly accounting statements to the participants. The annual budget definition expressly includes "costs of termination thereof as provided in Section 13". PA § 1(a), at 4. The final accounting section 13 requires is a final report to the participants as to any remaining decommissioning costs.

The agreements established successive sources of payments to the bondholders for the costs of debt service. First, when bonds are being sold to finance the projects, Bond Resolution (BR) § 6.8A2, at 42-43, requires WPPSS to pay from bond proceeds into the bond fund amounts necessary to provide for payment of interest on the bonds. These payments are defined as a "cost of construction." BR § 6.9F, at 46. It is apparent

these provisions were drafted to anticipate ongoing construction and bond sales. Inasmuch as these two activities are not indefinite, the parties provide for three "trigger" dates at which time alternative means of funding would be used. Under section 6.2 of the bond resolution, that date is the earliest of: (1) one month from the date of continuous operation (at which time operating revenues, at least in part, would begin to pay for the debt); or (2) July 25, 1988 (the presumed latest date for construction to be completed); or (3) one year after the date of termination. BR § 6.2A(1)-(3), at 29-31. As structured, there were "successive" sources of payment depending upon whether the projects were under construction, operating or terminated. Because the plants were terminated in January of 1982, the third alternative source would apply.

Under this latter provision, WPPSS must pay from the revenue fund to the bond fund "cost[s] of termination", *i.e.*, amounts necessary to satisfy the debt payments. BR § 6.2A(3), at 31. The definition of annual budget in the participants' agreement expressly includes "debt service", PA § 1(a), at 4, which means the participants must pay these amounts.

Respondents make several arguments. Their argument that the documents do not provided for "dry hole" risks is erroneous. The bond resolution provides for payment from "money pledged hereunder" which includes, by necessity, participants' revenues and does not depend on revenues generated by the project or general obligation bonds. Appellants argue that the costs of construction are explicitly exempted from the annual budget, PA § 1(a), at 3, which means that debt service is payable only from amounts properly payable into the revenue fund. The trial court correctly found that BR § 6.2A(3) resolves this problem. Finally, respondents argue they are not obligated to pay for any debt service because the annual budget definition limits debt service to payments from the "revenue fund". PA § 1(a), at 4. Respondents correctly point out that section 6.1 only defines what goes into the revenue fund, but that under section 6.2, WPPSS is required to pay for all unfunded debt service. Participants' pledge revenues must be used to pay those obligations.

For the foregoing reasons, I would affirm the initial ruling of the trial court which leaves for trial the equitable defenses asserted by the respondents. I would also deny bondholders' motion to intervene.

II

While I agree with a major part of the discussion by the majority regarding the history of the development of equitable remedies, it is important to first note that the history of our legal system suggests several general principles which shape the application of equitable relief. First, although lawyers generally speak of law and equity as separate concepts, history belies this characterization. Law and equity had common origins and goals. *See generally* W. de Funiak, *Modern Equity* 6 (2d ed. 1956); F. Maitland, *Equity* 15 (1949). They were brought to England via the Normans, diverged as the need arose to preserve individual jurisdiction and merged again as that need abated. F. Maitland, *supra.* Second, each legal system attempted to do justice within the confines of its procedural limitations and each, at some point, was more rigid in its rules than the other. G. Keeton & L. Sheridan, *Equity* 3 (1969). Third, both legal systems seem to have borrowed from each other during the period in which they had separate identities. Since that time, both systems have adopted concepts wholesale. One rule, common to both, is the proposition that the law will enforce promises.

Washington has consistently recognized equitable principles and enforced promises in specific circumstances. Our courts have stated: Equity will not suffer a wrong to be without a remedy, *Rummens v. Guaranty Trust Co.,* 199 Wash. 337, 346-47, 92 P.2d 228 (1939); equity treats that as done which by agreement is to be done, *Fleishbein v. Thorne,* 193 Wash. 65, 72, 74 P.2d 880 (1937); and he who comes into equity must come with clean hands, *Langley v. Devlin,* 95 Wash. 171, 187, 163 P. 395 (1917). To enforce these maxims, our legal system developed specific rules recognized in Washington law and elsewhere and described in part in the discussion in the majority.

There are two equitable theories which I believe warrant recovery by the appellants. Although the majority correctly concludes that RCW 62A.8-201 is inapplicable, RCW 62A.8 and our history of common law estoppel point to another theory of recovery raised by implication in the briefs of appellants. That theory, recognized long ago in English courts of equity, and now embodied in Restatement (Second) of Contracts § 90 (1981), states that a promise which the promissor should reasonably expect to induce action on the part of the promissee is binding if injustice can be avoided only by enforcement. Like equitable estoppel, our courts have acknowledged that under the right facts, the doctrine may be applied against a municipality. *See State v. Northwest Magnesite Co.,* 28 Wn.2d 1, 26, 182 P.2d 643 (1947). *See also* Annot., *Promissory Estoppel,* 48 A.L.R.2d 1069, 1086 (1956).

Promissory estoppel has four elements: a promise, foreseeability of reliance on that promise, actual reliance, and a finding that the reliance was justified. Comment, *Promissory Estoppel in Washington,* 55 Wash. L. Rev. 795 (1980). We find each element present here.

Appellants have repeatedly alleged, and respondents cannot deny, that they made unequivocal promises to pay these debts. Section 6 of the participants' agreement states in clear, definite language that the participants would make payments under the agreement whether or not any of the projects were completed. Reliance on that promise was not only foreseeable, it was intended. In the bond resolution (approved by the participants), potential bondholders were told that the plants were being developed for the participants, and that the participants pledged their revenues as security for the bonds. Each bond resolution was approved by the participants through their committee. See Bond Resolution, at 9. That there was actual reliance on the participants' promises cannot be doubted. The bondholders' collective purchase of $2.25 billion worth of bonds amply demonstrates that fact.

The final promissory estoppel prerequisite, that the reliance be justifiable, must, when viewed against the parties'

course of conduct for the 5 years prior to termination, be answered in the affirmative. Until the plants were terminated, all concerned assumed that the parties had the requisite statutory authority. The bonds were freely traded and interest payments timely made. Only when the plants were actually terminated did the participants attempt to avoid their promise to the bondholders. And, only with this court's opinion in *Chemical Bank* I, was the issue of statutory authority resolved.

Under these circumstances, I believe the participants' promise must be enforced to the extent that justice requires. My conclusion rests not only on the Restatement § 90 provision but also upon the public policy embodied in RCW 62A.8-201. While I reject the notion that the participants' agreement constitutes a security, I recognize that RCW 62A.8-202 reflects a clear legislative intent that municipalities as well as individuals be held responsible for their promises and actions.

I believe the same general limitations contained in RCW 62A.8 and cases concerning equitable estoppel should be adopted in applying the doctrine of promissory estoppel. Thus, the promise must be within the promisor's general power. See RCW 62A.8-201(2). Such is the case here. In this court's original majority opinion, we acknowledged the participants' general authority to enter into contracts to build nuclear power plants and to take the actions necessary to fund those plants but held that the participants had acted improperly in entering the dry hole contract. *Chemical Bank* I, at 784. Also, we recognize that the statutes contemplate general authority to act in this area. *See* RCW 35.92.050, RCW 43.52.300(1).

The majority concludes that the doctrine of unjust enrichment does not apply because the acts of the appellants were substantively ultra vires. The majority concludes that *Chemical Bank* I has already decided the issue of whether the contracts were procedurally or substantively ultra vires. I cannot agree.

When the term "substantive authority" was used in *Chemical Bank* I, it was not used in the sense of deciding whether it was procedurally or substantively ultra vires because that issue was not before us. In the past, this court has differentiated

between substantive and procedural ultra vires through use of the adjectives primary and secondary. The first classification (substantive or primary) refers to acts a municipality has no authority whatsoever to perform. In the second classification fall those acts which are within the lawful powers of the municipal corporation, but which are void because of an irregularity in the procedure leading up to the act. *Jones v. Centralia,* 157 Wash. 194, 218, 289 P. 3, 11 (1930). Whether these acts were primary or secondary ultra vires should not be decided summarily and requires further discussion.

The classic application of the primary ultra vires doctrine involves the invalidation of actions that directly contravene express constitutional or statutory provisions. The doctrine's harsh results make sense upon examination of the common law basis for the doctrine. Premised on the fundamental difference between the private and public sectors, application of the doctrine exhorts a private contractor to ascertain the authority and limitations of a municipal corporation. *See,* Comment, *An Aberration in Washington's Application of the Ultra Vires Doctrine, supra,* at 60-76.

One of the earliest cases concerning ultra vires is *Osborne, Tremper & Co. v. King Cy.,* 76 Wash. 277, 136 P. 138 (1913). In *Osborne,* the plaintiff sued King County for services performed under a contract with the river and harbor commission. A number of King County residents, operating upon the belief that the United States intended to construct the Lake Washington Ship Canal, petitioned the county commissioners for appointment of the river and harbor commission and it was thereafter appointed. The river and harbor commission then contracted with the plaintiff for preparation of an assessment roll. Payment for these services was to come from the property assessments. A few months later, the county commissioners rescinded the authority of the river and harbor commission. In the plaintiff's action to collect for services, the court denied recovery, noting the general rule

> that where there is a want of power to make a contract or a want of power on the part of the body of officers making the contract to bind the municipality, there can be no

> estoppel against the municipality to defeat payment by reason of accepting the benefit conferred by the contract.

Osborne, at 285-86. The court reasoned that the county commissioners did not have authority to create the assessment district, and therefore did not have authority to incur risks incident to the district's creation.

In *Edwards v. Renton,* 67 Wn.2d 598, 409 P.2d 153 (1965), the court confronted mixed substantive and procedural statutory violations, but approved recovery against the City of Renton. Renton had contracted with plaintiff for the installation of a traffic control signal, but failed to follow bidding procedures. The City neglected to properly budget funds for the installation. The court found that this contract represented a borrowing of funds which the City of Renton had no power to do. The court then went on to discuss the policy reasons for statutory municipal budget requirements and concluded that the contract ran afoul of these policies. Nonetheless, the court allowed a limited recovery where the contract was for a "public improvement furnished to and retained by the municipality [and where it was] within the scope of its authority to provide". *Edwards,* at 604. *Edwards* therefore moved the secondary ultra vires doctrine toward fulfilling the *reasonable* expectations of private parties contracting with public entities, consistent with the decline of the sovereign immunity doctrine. See RCW 4.92.090, 4.96.010.

The *Edwards* rule was further explained in *Finch v. Matthews,* 74 Wn.2d 161, 443 P.2d 833 (1968). *Finch* involved the power of King County to acquire and dispose of property in order to build roads. Although the facts are complicated, it appears that the county exchanged some worthless property for a road right of way. The City of Seattle then sought to annex the property, arguing that the County had no power to dispose of it because the property exchanged was dedicated "'to the use of the public forever'". *Finch,* at 163. The City urged a narrow interpretation of equitable estoppel against a municipality, arguing in essence that the doctrine could be valid "only when the governmental act is strictly within the recognized and

established powers of government." *Finch,* at 169. The court rejected this view of equitable estoppel, holding instead that the distinction was between acts done "*wholly without legal authorization*" or in "*direct violation of existing statutes*" and "*those acts which are within the scope of the broad governmental powers conferred, granted or delegated*". (Italics mine.) *Finch,* at 172.

In *Noel v. Cole,* 98 Wn.2d 375, 655 P.2d 245 (1982), the court most recently affirmed the *Edwards* analysis. In *Noel,* the court concluded that the Department of Natural Resources had authority to sell timber, but not without preparing an environmental impact statement. However, regulations in effect required no EIS be prepared. Finding the sale a procedural violation and because both the DNR and the purchaser had acted in good faith, the court held that recovery for the purchaser was necessary to prevent unjust enrichment. *Noel,* at 381.

I believe the instant case falls within the *Edwards-Noel* rule. The majority concluded in *Chemical Bank* I, "the Washington statutes authorize the participants to purchase power or to own electric generating facilities." *Chemical Bank* I, at 799. To that end, and to fulfill their statutory duty to develop sufficient energy sources, the participants entered into the agreements and subsequently pledged their revenues. Those acts are within their general powers as contemplated by *Noel, Finch, Edwards* and *Osborne.* Thus, as the action of the state or municipalities in entering into the agreements was only procedurally ultra vires, restitution may be obtained if a benefit was in fact given.

As to the remaining arguments of respondents, the common law doctrines which released their contractual obligations contemplate restitution if one party receives a benefit. For example, Restatement (Second) of Contracts § 272 (1981) states the remedy to be given if frustration occurs:

> (1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 377.

> (2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

Similarly, as noted in *Simonson v. Fendell,* 101 Wn.2d 88, 93, 675 P.2d 1218 (1984), mutual mistake entitles the parties to rescission and return to their original position. As a

> general principle . . . rescission contemplates restoration of the parties to as near their former position as possible or practical. *J.I. Case Credit Corp. v. Stark,* 64 Wn.2d 470, 392 P.2d 215 (1964); *Yount v. Indianola Beach Estates, Inc.,* 63 Wn.2d 519, 387 P.2d 975 (1964).

Here, however, it would be impossible to return the parties to their positions prior to the contract given the lack of statutory authority of those participants released by *Chemical Bank* I. Those participants represent approximately 70 percent of the total monetary obligation. Justice requires some sort of restitution to the bondholders. Because the public utilities and municipalities also have equitable obligations, the remaining discussion concerning remedy, benefit and equitable distribution of loss will apply equally to those released by our original decision, and those released on common law contractual grounds.

As noted above, the Restatement's definition of benefit is quite broad. Thus, the task here is to determine whether any asserted benefits fall within this definition. I conclude they do.

WPPSS asked for and received $2.25 billion in bond revenues on the request of the participants. The participants received exactly what they bargained for through their representatives on WPPSS. As noted in comment *a* to Restatement (Second) of Contracts § 370 (1981), receipt by a party of performance bargained for is regarded as a benefit. I believe the facts of this case amply demonstrate that proposition.

Further, this arrangement by which participants purchased shares of the plants' electrical output in return for their pledge of revenues satisfied the utilities' duty to develop sufficient

energy resources for their ratepayers. The pertinent statutes contemplate that electrical needs of a city or public utility district will be filled. To do this, the participants must spend significant sums of money to develop alternative resources to meet future demands. The City of Seattle, as amicus, observes that it has spent $37 million for various small projects, and will spend $21 million *annually* for settlement of the High Ross Agreements. The total cost of projects now in progress is $164 million. Several of these projects have been terminated and, as a result, the City of Seattle has absorbed the entire loss. Brief of amicus curiae City of Seattle, at 19. Clearly, most of the participants involved in WNP 4 and WNP 5 could not absorb similar development costs. To the extent that the nuclear plant projects relieved the participants of their immediate costs, while allowing them to fulfill their statutory duty, they received benefits from the bondholders.

Finally, it was for the participants' benefit that the plants were being built in the first place. By entering into these agreements, pledging their revenues as security and inducing the bondholders to lend money to WPPSS, the participants anticipated that they would be able to guarantee their consumers electricity at the low rates projected for nuclear power. Without such an arrangement, each utility would have had to either develop other sources of electricity or purchase electricity at whatever would be the then current market price. The bond revenues allowed them to avoid consideration of both of these alternatives.

Moreover, I am not persuaded by respondents theory that the benefits of the bond revenues flowed to WPPSS and no further. As discussed in detail above, WPPSS existed as a joint venture of the member utilities and the participants. Despite the majority's conclusion that the participants lacked the statutorily required ownership interest, I believe that the real interested parties to this transaction were the participants. To them, the benefits flowed and, from them, restitution is therefore proper. These factors lead me to the conclusion that justice requires some relief to the bondholders.

Remedy

The appellants have established two theories of recovery—promissory estoppel and unjust enrichment. Restatement (Second) of Contracts § 90 (1981) states that the remedy for a breach of promissory estoppel may be limited as justice requires. Similarly, the Restatement of Restitution § 1 (Tent. Draft No. 1 1983) provides:

> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

Appellants contend that principles of restitution entitle the bondholders to the entire $2.25 billion plus interest. I disagree. This figure would grant the bondholders their expectancy interest on the contracts. The majority has held that those contracts are void, however. Moreover, appellants' suggested remedy ignores the realities of the bond market. Much of the loss suffered by the bondholders is the result of panic-trading, speculation, and other forces that cannot be attributed solely to the participants' breach of promise. For instance, even before the participants disputed their legal obligation, prices quoted in the Wall Street Journal indicated the bonds were trading at levels substantially below par.

Also, appellants' argument for full restitution confuses the amount loaned WPPSS with the amount of benefit received by the participants. Just as the bondholders' investment was diluted by market forces, the participants benefit was diluted by rising interest rates and market forces which made completion of the plants impossible.

Finally, amongst the people who now hold these bonds are numerous individuals who purchased their bonds after this court clearly stated that no statutory authority existed to enter the contracts. Those individuals do not come to equity with "clean hands" and I believe no equitable considerations weigh in favor of granting these individuals a windfall.

Given the complexity of this case and the posture in which it is now before this court, I am unable to discern the proper amount of recovery to the bondholders. I believe that equitable principles, however, require that we recognize the complex forces that led to the bondholders' present loss. Those principles convince me that the proper measure of restitution in this case may not exceed the value of the bonds on the day prior to our decision in *Chemical Bank* I. After that date, investors were clearly on notice that no authority existed. Prior to that date, much of the bondholders' investment was dissipated by forces unrelated to the participants' promises. Moreover, I also believe that individuals purchasing their bonds after that date should be entitled to the purchase price of those bonds and no more. It would be inequitable to allow these individuals to profit from the losses of bona fide bondholders and the participants' ratepayers. Finally, I believe that the participants are entitled either to an offset of any value contained in the plants or to the plants themselves.

This award sets only the maximum amount of recovery I would allow under the legal theories herein discussed. The trial judge could reduce this amount by other equitable considerations and may make such provisions for payment of the judgment as are just and equitable, considering the relative positions of the bondholders and ratepayers.

For the foregoing reasons, I dissent.

DOLLIVER, J. and ALEXANDER, J. Pro Tem., concur with UTTER, J.

APPENDIX B

99 Wash. 2d 772, 666 P.2d. 329
CHEMICAL BANK, a New York
corporation, Respondent,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
a Washington municipal corporation
and joint operating agency, Respondent,

and

Columbia Rural Electric Association, Inc.,
an Oregon corporation, *et al.*, Petitioners.

No. 49186-1.

Supreme Court of Washington,
En Banc.

June 15, 1983.

Reversed.

Dore, J., concurred in result and filed opinion. Utter, J., dissented and filed opionion in which Dolliver, J., concurred.

Helsell, Fetterman, Martin, Todd & Hokanson by Richard S. White, David F. Jurca, and Linda J. Cochran, Seattle, Wash., for petitioner Columbia Rural Elec. Assn.

Stimson Bullitt, Gordon W. Wilcox, and John D. Lowery of Riddell, Williams, Bullitt & Walkinshaw, Seattle, Wash., for 21 petitioners.

Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern by Albert R. Malanca, Kenneth G. Kieffer, Donald S. Cohen, and John C. Guadnola, Tacoma, Wash., for petitioners Washington Public Utilities Group.

Milne, Lemargie & Fitterer by Robert Milne, Ephrata, Wash., Davis, Arneil, Dorsey, Kight & Parlette by David J. Dorsey, Wenatchee, Wash., and Williams, Novack & Hansen by Jeffrey E. Pratt, Everett, Wash., for petitioners PUD's Nos. 1 and 2.

George, Hull & Porter, P.S. by John D. Reagh and Richard A. Pitt, Seattle, Wash., for petitioners Cities of Canby, Cascade Locks, and Drain.

Jones, Grey & Bayley, P.S. by Hugo E. Oswald, Jr., Margaret E. Pageler, and Charles H. Thulin, Seattle Wash., for petitioner City of Ellensburg.

Detels, Draper, Madden & McGee by Martin P. Detels and Bonita L. Olson, Seattle, Wash., Rankin, McMurry, Vav-Rosky & Doherty by Garry P. McMurry, Portland, Or., and Haugeberg & Rueter by David Haugeberg, McMinnville, Or., for petitioners Cities of McMinnville and Springfield.

Smith & Rosellini by Jacob L. Smith, Lynden, Wash., for petitioner City of Sumas.

Lane, Powell, Moss & Miller, John R. Tomlinson, Larry S. Gangnes, and H. Peter Sorg, Jr., Seattle, Wash. (Schwabe, Williamson, Wyatt, Moore & Roberts, Rockne Gill, J. Laurence Cable, Donald A. Haagensen, and Bernard Ryan, Portland, Or., Heisler & Heisler and Stanley D. Heisler, The Dalles, Or., and George P. Winslow, Jr., Tillamook, Or., of counsel), for petitioners Oregon PUD's.

Frome & Goulding and Ted C. Frome, Afton, Wyo., for petitioner Lower Valley Power and Light, Inc.

Velikanje, Moore & Shore, Inc., P.S. by Scott L. Schmidtman, Yakima, Wash., for petitioners Borgens, *et al.*

William H. Rodgers, Jr., Peter J. Eglick, and Michael W. Gendler, Seattle, Wash., for petitioners Clark County PUD Owners' Ass'n, *et al.*

Betts, Patterson & Mines, P.S. by Michael Mines, Seattle, Wash. (Cravath, Swaine & Moore, New York City, of counsel), for respondent Chemical Bank.

Culp, Dwyer, Guterson & Grader, Richard C. Yarmuth, Michele Coad, Earle J. Hereford, Jr., Edwards & Barbieri, and Malcolm L. Edwards, Seattle, Wash., for respondent Washington Public Power Supply System.

Roberts & Shefelman, George M. Mack, and Joni H. Ostergaard, Seattle, Wash. (James M. Taylor, City Atty., Seattle, Wash., of counsel), for respondent City of Richland.

Forrest W. Walls, Douglas H. Rosenberg, and William M. Doyle, Seattle, Wash., on behalf of Washington Public Ports Association, amici curiae for respondents.

BRACHTENBACH, Justice.

The Washington Public Power Supply System (WPPSS) issued revenue bonds to obtain funds to construct two nuclear generating plants known as WNP-4 and WNP-5. Bonds in the face amount of approximately $2.25 billion have been issued; repayment with interest will cost approximately $7.2 billion. Chemical Bank is the trustee for the bondholders.

Construction of the two plants was undertaken. On January 22, 1982 WPPSS terminated construction of both plants. At that time WNP-4 was approximately 24 percent completed and WNP-5 approximately 16 percent completed. Costs to date had almost reached the original estimated total cost for complete construction of both plants. WPPSS alleges that termination was necessary due to its inability to obtain adequate financing to complete the projects.

Chemical Bank brought a declaratory judgment action against WPPSS and the participants (defined hereafter) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, with interest. In general WPPSS has responded to the suit by substantially agreeing with Chemical Bank as to the rights and obligations of the various parties. Most of the participants, however, have interposed numerous defenses to any payment obligation.

The pleadings framed numerous issues, some of which have been determined by the trial court on motions for partial summary judgment. We granted discretionary review on limited issues on which the trial court granted summary judgment in favor of the bond trustee and stayed further trial on other issues until this appeal was decided. On some of those issues we reverse.

To understand the complex issues, a recital of facts is necessary. WPPSS is a "joint operating agency" established in 1957 under RCW 43.52. It is a municipal corporation. RCW 43.52.250. Its members are 19 public utility districts and four cities, Ellensburg, Richland, Seattle and Tacoma. It has authority to acquire, build, operate and own power plants and systems for the generation and transmission of electricity. RCW 43.52.300. WPPSS also has authority to issue revenue bonds payable from the revenues of the utility properties operated by it. RCW 43.52.3411. It may not levy taxes or issue general obligation bonds. RCW 43.52.891.

In the early 1970's WPPSS started construction of three nuclear generating projects, WNP-1, WNP-2 and WNP-3. Those projects were developed in conjunction with a number of participating public utilities from several northwestern states, including Washington. In 1974 WPPSS decided to construct two additional plants, WNP-4 and WNP-5, financing of which is the subject of this litigation. WNP-4 is owned entirely by WPPSS; WNP-5 is owned 90 percent by WPPSS and 10 percent by Public Power & Light Company, a privately owned utility.

Besides WPPSS and Pacific Power & Light Company, there are 88 "Participants" in these two projects: 9 Washington cities, 19 Washington public utility districts, 1 Washington irrigation district, 7 Oregon cities, 4 Oregon peoples utility districts, 5 Idaho cities, and 43 rural electric cooperatives, of which 13 are in Washington. The remainder of the REC's are in Idaho, Montana, Nevada, Oregon and Wyoming. Each of the participants in WNP-4 and WNP-5 signed an identical 63-page "Participants' Agreement", dated July 14, 1976.

A 117-page "Bond Resolution" was adopted by WPPSS on February 23, 1977 providing a plan for the construction of both plants and providing for the issuance of revenue bonds.

Each Participants' Agreement provided that "[s]upply System hereby sells, and the Participant hereby purchases, its Participant's Share of Project Capability."

"Project Capability" is defined in section 1(v) of the agreement as:

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

The Participants' Agreement requires each participant to pay monthly its proportionate share of a "Billing Statement" issued annually by WPPSS and based upon an "Annual Budget." The "Annual Budget" is to be adopted by WPPSS commencing with the "Date of Continuous Operation" (defined in effect as when the plant is ready to be operated and the output scheduled on a commercial basis) OR the date 1 year after the termination of a project. The Bond Resolution in turn similarly requires WPPSS to collect and set aside funds sufficient to make payments on the bonds. Termination thus established a trigger date for various payments, and gave rise to this lawsuit.

The Participants' Agreement purports to require payment to WPPSS whether or not the projects are ever completed, operable or operating. Specifically, section 6(d) provides:

> The Participant shall make the payments to be made to Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

The Bond Resolution requires WPPSS to collect charges for electricity and capability, which are adequate to provide for payment of the revenue bonds "whether or not the generation or transmission of power . . . is suspended, interrupted or reduced by any reason whatever . . ."

Thus, if the agreements are valid, and subject to interpreting the contract, the participants collectively could pay approximately $7 billion for nuclear plants which will never generate any electricity. Ultimately the ratepaying consumers of the participants would pay for the nonexistent electricity.

The method of financing WNP-1, 2 and 3 differs from the involved in WNP-4 and 5. The Bonneville Power Administration, a federal agency, facilitated financing of the first three plants through complex "net-billing" agreements that allocated the risk of noncompletion to the federal agency. *Springfield v. Washington Pub. Power Supply Sys.*, 564 F. Supp. 90 at 95 (D. Or. 1983). Since Judge Redden concluded that net billing only requires the participants to pay for power as it is provided, *Springfield*, at 12, those projects apparently may be characterized as contracts for the purpose of power. We need not analyze this device, but note that it resulted in an indirect guaranty by Bonneville Power Administration, combined the costs of nuclear power plant construction with less costly hydropower and resulted in lower interest rates on the bonds.

The rates charged by WPPSS or public utility districts are not subject to the ratemaking supervision of the State Utilities and Transportation Commission. RCW 43.52.450; RCW 54.16.040.

As noted above, various participants interposed numerous defenses to the Chemical Bank action and cross claims against WPPSS. Among those defenses were (1) allegations that at least some participants did not have authority to enter into the agreement; and (2) that proper interpretation of the agreement did not require payment as sought by WPPSS and the bond trustee. Demand for a jury was made.

After hearing extensive oral argument and considering voluminous briefs and affidavits (the record is nearly 7,000

pages) the trial court entered an order on summary judgment motions on November 16, 1982 which provided *inter alia:*

> 1. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of the debt service which WPPSS is obligated to pay on the bonds issued pursuant to WPPSS Board of Directors Resolution No. 890 (the 'Bond Resolution') and the resolution supplemental thereto. Such debt service on the bonds includes all principal and interest when due, whether or not any of the projects (WPPSS Nuclear Plants Nos. 4 and 5) has been or ever will be completed or placed into operation.
>
> 2. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of decommissioning costs incurred by WPPSS, whether or not any of the projects has been or ever will be completed or placed into operation. Under the terms of the Participants' Agreement, such decommissioning costs (a) are not limited to costs incurred after termination of the projects and (b) are to be included in the Annual Budgets to be paid by the Participants pursuant to the annual or amended Billing Statements.
>
> 3. As a matter of law, WPPSS had statutory authority to enter into the Participants' Agreement and Bond Resolution and to issue the bonds pursuant thereto.
>
> 4. As a matter of law, the Washington participants (other than Vera) had statutory authority to enter into the Participants' Agreement. All Oregon authority issues have been stayed pursuant to an earlier order of this court, and this order has no bearing on the authority of Oregon participants to enter into the Participants' Agreement. The court reserves decision as to whether Vera and the other participants had authority to enter into the Participants' Agreement and will give further consideration to that issue at a later date.

5. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the incurring of debt. Such obligations do not constitute debt within the meaning of such limitations, and even if such limitations were otherwise applicable they would be rendered inapplicable by reason of the special fund doctrine under Washington law.

6. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the lending of credit.

7. As a matter of law, the Participants' Agreement does not constitute or provide for any unlawful delegations of power or authority by Washington participants.

8. The Interstate Compact Clause of the United States Constitution is not applicable to the Participants' Agreement.

* * * * *

10. The aforesaid crossmotion for summary judgment or partial summary judgment filed by Ellensburg, Springfield and McMinnville, the 'Columbia defendants' and the '22 defendants' are denied.

Clerk's Papers, at 120-22.

Later the court struck the jury demand. We granted review of the authority and interpretation issues as well as the striking of the jury.[1]

We are asked to decide whether the Participants' Agreement and the Bond Resolution, hereinafter referred to as the agreement, were contracts within the statutory authority of the

[1]This opinion is limited to the statutory authority questions and we do not address the other issues presented by the parties: the right to a jury; WPPSS' authority; municipal debt limitations; or contract interpretation.

Washington participants.[2] While the participants are not direct parties to the Bond Resolution, the Participants' Agreement, § 25, provides that WPPSS must comply with the Bond Resolution and the Participants' Agreement is subject to the terms of the Bond Resolution.

Initially, some principles of statutory construction are relevant to the court's analysis. "Language within a statute must be read in context with the entire statute and construed in a manner consistent with the general purpose of the statute." *Nationwide Papers, Inc. v. Northwest Egg Sales, Inc.*, 69 Wash.2d 72, 76, 416 P.2d 687 (1966). Similarly, "[s]tatutes pertaining to the same subject matter must be harmonized, if possible." *Snohomish Cy. PUD 1 v. Broadview Television Co.*, 91 Wash.2d 3, 8, 586 P.2d 851 (1978). The resolution of the authority issue requires an examination of the entire statutory scheme governing each category of participant to determine whether they had the express power to enter into this agreement. Absent express statutory authorization, we must also consider whether participation in the agreement may be based upon necessary or implied powers. Aided by applicable rules of statutory construction and prior cases construing the various statutory powers, we ultimately must decide whether the present agreement conforms to the statutes. Our conclusion in this case is therefore based upon an examination of all Washington statutes authorizing the purchase of electricity, the

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[2] This issue is limited to the authority of the Washington PUD's and municipalities, hereinafter referred to collectively as the participants. The authority of most of the rural electrical cooperatives (including those in Washington) and the Vera Irrigation District were the subject of separate trial court orders and are not before this court. The authority of the Idaho, Oregon, Wyoming and Nevada participants is currently being litigated in their respective states.

An Oregon trial court has held that Oregon cities and PUD's lacked authority and the agreement was contrary to public policy. Defazio v. Springfield Utility Board, cause 16-81-11344 (Lane County Cir. Ct. Nov. 5, 1982). That case is on appeal. The Idaho Supreme Court has entered an order prohibiting collection of funds until the matter is decided on the merits. Asson v. City of Burley, cause 82-174 (Sup. Ct. Nov. 3, 1982). The Wyoming Rate Commission has ruled that rates may not be increased to pay the WPPSS debt.

acquisition or construction of generating facilities, joint operating agencies, and joint development of energy generating projects.

I. PURCHASE OF ELECTRICITY

The Washington participants have explicit statutory authority to buy electricity on behalf of citizens. For example, each of the 19 Washington Public Utility Districts (PUD's) involved in this litigation is authorized to: "purchase, within or without its limits, electric current for sale and distribution within or without its limits . . ." RCW 54.16.040.

Similarly, the nine Washington municipal participants could purchase electricity, although the grants of authority varied according to the class of city or town. The first class cities of Tacoma and Richland were authorized to: "provide for lighting the streets and all public places, and for furnishing the inhabitants thereof with gas or other lights . . ." RCW 35.22.280(15). Centralia, the only participant exercising second class city powers,[3] had the authority to: "provide for lighting the streets and all public places of the city and for furnishing the inhabitants of the city with gas, electric, or other light . . ." RCW 35.23.440(44). As third class cities, Blaine and Ellensburg had the power to: "establish, lay out, alter, keep open, open, widen, vacate, improve and repair streets, sidewalks, alleys, squares and other public highways and places within the city, and to drain, sprinkle and light the same . . ." RCW 35.24.290(3). In practically identical language, towns such as McCleary and Steilacoom were authorized to secure electricity. RCW 35.27.370(4). The final category of municipal participants, code cities, includes Port Angeles and Sumas. A code city may: "provide utility service within and without its limits and exercise all powers to the extent authorized by general law for any class of city or town." RCW 35A.80.010.

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[3] Although not of sufficient size to qualify as a second class city, Centralia under the commission form of government exercised all the powers of a second class city. RCW 35.17.030.

In addition to these categorical grants of enumerated powers, the PUD's and cities[4] were authorized, under the statutory provisions that created WPPSS, to: "enter into contracts or compacts with any operating agency or a publicly or privately owned public utility for the purchase and sale of electric energy or falling waters." RCW 43.52.410. Thus, the various statutes clearly provide for Washington PUD's, cities and towns to purchase and sell electricity.

Initially, we must decide whether this agreement is authorized as a purchase of electricity by the participants. As discussed in greater detail *infra*, the purchase of "project capability" under this agreement is essentially an unconditional guaranty of payments on the revenue bonds, secured by a pledge of the participants' utility revenues, in exchange for a share of any power generated by these projects. The agreement expressly provides for the possibility that no electricity will be generated and that participant payments will be due even if the project is not completed. The unconditional obligation to pay for no electricity is hardly the purchase of electricity. We hold that an agreement to purchase project capability does not qualify as a purchase of electricity.

II. ACQUISITION OF ELECTRIC GENERATING FACILITIES

Another type of express authority granted to cities and towns is the power to construct, acquire and operate electric generating facilities. RCW 35.92.050. That statute provides:

> A city or town may also construct, condemn and purchase, purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power and facilities for lighting, heating, fuel, and power purposes, public and private, with full authority to regulate and control the use, distribution, and price thereof, together

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[4] City is defined in RCW 43.52 as: " 'City means any city or town in the state of Washington authorized to engage in the business of generating and/or distributing electricity." RCW 43.52.250.

> with the right to handle and sell or lease, any meters, lamps, motors, transformers, and equipment or accessories of any kind, necessary and convenient for the use, distribution, and sale thereof; authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its inhabitants and to other persons doing business within the city or town and regulate and control the use and price thereof.

RCW 35.92.050. Under this provision the municipalities clearly had the authority to build or buy their own plants. *Jones v. Centralia,* 157 Wash. 194, 289 P. 3 (1930). In almost identical language, the PUD's are granted the express authority to construct, acquire and operate electric generating facilities. RCW 54.16.040. The respective powers of the PUD's and cities are similar and therefore subject to a similar construction. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 127-30, 182 P.2d 706 (1947). Under the provisions, the participants clearly could construct, acquire and operate generating facilities.

In construing these provisions, however, this court has never found authority for a project in which the participants did not have an ownership interest. *E.g., Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953); *State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 246 P.2d 1081 (1952). Under this agreement, Section 1.1(*o*) of the Bond Resolution expressly provides that only WPPSS and Pacific Power & Light Supply Company retain any ownership interest in the projects. In comparison, the participants do not retain an ownership share in this project but only contracted to buy from WPPSS a share of project capability. Section 1(v) of the Participants' Agreement defines "project capability" as:

> "Project capability" means the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, inter-

> fered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

The "electric power and energy, if any" language indicates that the parties anticipated a possible share of no power. This impression is reinforced by section 6(d) of the Participants' Agreement which purportedly mandates payment by the participants irrespective of project completion. This so-called "dry hole" provision states:

> The Participant shall make the payments to be made to the Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy.

In effect, the participants unconditionally guaranteed WPPSS bonds with no guaranty of electricity in return.

Some states have provided statutory authority for such unconditional guaranties and courts have recognized the validity of projects developed under those provisions. *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982). That recognition, however, is based upon very explicit statutory authority. Such Carolina's "Joint Municipal Electric Power and Energy Act" provides an example:

> Any municipality which is a member of the joint agency may contract to buy from the joint agency power and energy required for its present or future requirements, including the capacity and output of one or more specified projects. As the creation of a joint agency is an alternative method whereby a municipality may obtain the benefits

> and assume the responsibilities of ownership in a project, *any such contract may provide that the municipality so contracting shall be obligated to make the payments required by the contract whether or not a project is completed, operable or operating notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a project or the power and energy contracted for,* and that such payments under the contract shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance of the joint agency or any other member of the joint agency under the contract or any other instrument.

(Italics ours.) S.C. Code Ann. § 6-23-110 (Law. Co-op. Supp. 1982). Several other states have similar statutes. Mass.Ann. Laws, ch. 164A, § 3(b) (Law.Co-op. 1979); Me.Rev.Stat.Ann. tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen.Stat. § 159B-12 (1982); Va.Code § 15.1-1611 (1981); Vt.Stat.Ann., tit. 30, § 604 (Supp. 1982). This state has no such statute.

Nonetheless, rather than ruling that an ownership interest is an absolute requirement when acquiring or constructing generating facilities, we will examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest. In the present case, several provisions of the agreement limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed. For example, Section 15 of the Participants' Agreement requires the establishment of a "participants' committee" to meet periodically and to approve or disapprove major decisions relating to the management of projects. Items that are explicitly set out in the agreement to be referred to the committee include: construction budgets, contracts involving more than $2 million and proposed bond regulations. The inclusion of such items suggests a degree of control and involvement in management, yet Section 15 also sets out a procedure for committee consideration of WPPSS proposals that precludes meaningful deliberation on the part of the committee. With limited exceptions, that procedure requires that 20 percent of the

participants register their *disapproval* of any WPPSS proposal within 15 days or that proposal "shall be deemed approved." Considering the complexity of the various budgetary items, construction decisions and financing arrangements involved in a project of this scope, it seems unlikely that a part-time committee of representative participants could provide significant input to the management of the projects with such rigid procedural requirements. It appears to this court that such limited involvement in project management does not satisfy the type of ownership control envisioned in the statutes.

It should be noted that we recognize the necessity and propriety of establishing representative committees to manage and oversee joint development projects. *E.g., Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953); *PUD 1 v. Taxpayers of Snohomish Cy.,* 78 Wash.2d 724, 479 P.2d 61 (1971). Our concern is not with the use of such committees in general; it is with the structuring of such committee procedures in a way that does not allow sufficient participant involvement in project management to control their risk. Thus, although this court recognizes the need for delegating duties in the context of joint development agreements, *e.g., Roehl,* 43 Wash.2d at 238-40, 261 P.2d 92; *Snohomish Cy.,* 78 Wash.2d at 731, 479 P.2d 61, we are not prepared to sanction a virtual abdication of all management functions and policy decisions to an operating agency such as WPPSS. Here, the participant's committee apparently served as a rubber stamp for WPPSS' decisions, resulting in two terminated projects, less than 25 percent complete, at a cost of $2.25 billion, or almost $7 billion over the 30-year repayment period. As a matter of public policy, the enormous risk to ratepayers must be balanced by either the benefit of ownership or substantial management control.

Also, there is language common to each set of statutes indicating the Legislature intended that cities and PUD's should retain significant control over the use of any facilities acquired. For example, the statutes provide that the cities and PUD's have: "full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges, and price thereof . . ." RCW 54.16.040; RCW 35.92.050. While the

public entities had the statutory authority to construct or acquire electric generating facilities, that authority is conditioned upon either an ownership interest or their active participation in the management of these facilities. Here, the municipal and PUD participants were not acquiring or constructing generating facilities as set out in the statutes because under the agreement they ceded virtually all of their ownership interests and most of the management responsibilities to WPPSS.

The need for a municipality or PUD to retain ownership and control over public construction projects is also evident from earlier decisions in which this court considered the PUD's authority to acquire or construct electric generating facilities as the basis for proposed power projects. In 1947 we analyzed the authority of Skagit County PUD to acquire the electricity production and distribution properties of Puget Sound Power & Light Company, an integrated electric generating system. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 182 P.2d 706 (1947). The Skagit County PUD argued that its authority to "purchase, within or without its limits, electric current for sale and distribution within or without its limits", Rem.Rev.Stat. § 11610(d) (Supp. 1945) (now codified as RCW 54.16.040), included the power to buy Puget Power properties. This court carefully reviewed all of the PUD statutes and concluded that the primary purpose of the public utility districts is to furnish electricity to the district and its inhabitants. *Wylie,* at 126, 182 P.2d 706. Therefore, the court concluded the PUD was not authorized to purchase facilities covering 18 counties, when the district needed only 5 percent of that generating capacity. As we stated, such a project would be, "unreasonably large and entirely inappropriate for the accomplishment of the primary purpose of the Skagit district." *Wylie,* at 152, 182 P.2d 706; *accord, Jones v. Centralia,* 157 Wash. 194, 289 P. 3 (1930) (city's power projects held to same standard of unreasonably large or entirely inappropriate). Since this case does not involve a specific challenge to the scale of this project, it is the court's reasoning rather than the result that is relevant. In particular:

> [t]here is nothing . . . which indicates that the act was intended to give public utility districts the power to engage in business beyond their limits on the grandiose scale here contemplated, and there are numerous provisions that are inconsistent with any such idea.

Wylie, 28 Wash.2d at 147, 182 P.2d 706. The court's analysis established that even the express power to buy and sell electricity or to acquire or construct generating facilities may not be exercised in a manner beyond the scope of that primary purpose or such a project would be ultra vires.

These same statutory provisions were analyzed several years later in a case involving the Pend Oreille PUD's decision to build hydroelectric facilities in its own district. *State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 246 P.2d 1081 (1952). Although the proposed project was massive and would have provided a supply of power well beyond the district's needs, this court concluded that the project was within the PUD's statutory authority. The court once again examined the entire PUD statutory scheme, but concluded that the primary purpose of providing power for the district included the duty to secure future power needs, even though at that time the district could use only 10 to 12 percent of the project capacity. *Schwab,* at 824-25, 246 P.2d 1081. Respondents in this case argue that the same principle, providing future district energy needs, applies here and provides sufficient authority for participants to enter into the instant agreement. The extension of that principle is not that simple, however, because in *Schwab* the district retained all ownership interest in the facilities as well as management and control of the project. Here, those same elements of ownership and management are not present and the participant's risks were not subject to their control.

The year after *Schwab* was decided, this court considered a case involving joint development of a generating project and some of the problems of joint management of a project. *Roehl v. PUD 1,* 43 Wash.2d 214, 261 P.2d 92 (1953). In *Roehl,* five PUD's attempted to acquire the electric utility properties of Puget Sound Power & Light Company. Such a joint effort was authorized under a 1949 amendment to the PUD statutes, Laws

of 1949, ch. 227, § 2, (now codified as RCW 54.16.200). Appellants alleged that the system was unreasonably large under *Wylie* and therefore exceeded the PUD's statutory authority. This court, however, held that the new joint acquisition statute allowed two or more districts to acquire integrated electric facilities beyond district lines. *Roehl,* at 237, 261 P.2d 92. Unlike the provisions governing single districts at issue in *Wylie* and *Schwab,* the new statute did not carry the implication that acquired facilities must be located within or necessary to serve the customers of the purchasing district. *Roehl,* at 237, 261 P.2d 92. The court also addressed the issue of PUD control over the project, concluding that the executive board, consisting of one member from each utility, was responsible for overall project management and policy decisions, while the consulting engineer only performed administrative tasks relating to project operation. *Roehl,* at 240-41, 261 P.2d 92. That same degree of participant control is not present in this case because most of the policy decisions and management control are delegated to WPPSS, the operating agency, rather than any executive committee.

Applying the language of the acquisition or construction statutes and the principles derived from the cases construing that language, we do not believe the participants retained sufficient ownership interests or management responsibilities under this agreement to constitute acquisition or construction of an electric generating facility.

III. IMPLIED POWERS

On separate grounds, respondents urge, and the trial court ruled, that the express authority to acquire or construct generating facilities and provide electricity carries with it an implied power to pay for that service. *Municipality of Metro Seattle v. Seattle,* 57 Wash.2d 446, 459-60, 357 P.2d 863 (1960). In *Metro* this court upheld the City of Seattle's power to pledge city revenues to a countywide agency in order to pay for sewage disposal service. Since the statutes authorized the cities to provide sewage services and systems, we held: "[i]t must follow that with the power to provide a sewer system there is

implied the power to pay for it, unless otherwise prohibited by the charter or statute." *Metro,* at 460, 357 P.2d 863. In the present case, the trial court extended this reasoning and concluded that the implied power to pay also included the power to make financing arrangements such as the present agreement. We disagree.

The services the city contracted for in *Metro* were to be paid as the services were provided, *Metro,* at 458-59, 357 P.2d 863, which is significantly different from the type of unconditional pledge of revenues contained in this agreement. Also, the countywide agency agreed to process and dispose of the sewage in part through the use of the city's existing sewage treatment plants. *Metro,* at 449, 357 P.2d 863. Since the city continued to own the sewage treatment facilities, the revenues pledged were actually paid back to the city for the use of its facilities and these funds helped pay for those plants. That arrangement is distinguishable from the present agreement because here the pledges of revenues are not conditioned upon the receipt of services and in *Metro* the city owned the facility used to provide the services.

This court subsequently adopted a more stringent test for a municipality seeking to incur indebtedness based upon general grants of authority to provide services. In *Edwards v. Renton,* 67 Wash.2d 598, 602, 409 P.2d 153 (1965), we held that the power to borrow money: "should not and will not be inferred or implied from a general statutory authority permitting municipalities to enter into contracts or to incur indebtedness." Moreover, a municipal corporation's powers are limited to those conferred in express terms or those necessarily implied. *In re Seattle,* 96 Wash.2d 616, 629, 638 P.2d 549 (1981). If there is any doubt about a claimed grant of power it must be denied. *Port of Seattle v. State Utils. & Transp. Comm'n,* 92 Wash.2d 789, 794-95, 597 P.2d 383 (1979). The test for necessary or implied municipal powers is legal necessity rather than practical necessity. *Hillis Homes, Inc. v. Snohomish Cy.,* 97 Wash.2d 804, 808, 650 P.2d 193 (1982). As we stated in *Hillis:* " [i]f the Legislature has not authorized the action in question, it is invalid no matter how necessary it might be."

The parties argue that first class cities have greater powers than other municipalities, which precludes a narrow statutory construction. Generally, first class cities may exercise powers that do not violate a constitutional provision, legislative enactment, or the city's own charter. *Winkenwerder v. Yakima,* 52 Wash.2d 617, 622-23, 328 P.2d 873 (1958). These broad powers are derived from first class cities' status as "home rule" municipalities, *i.e.,* cities that frame their own charters and consequently retain broad control over local matters. Const. art. 11, § 10. In some states, the home rule powers of municipalities result in considerable autonomy from state control. *E.g., Board of Cy. Comm'rs v. Thornton,* Colo., 629 P.2d 605, 609-10 (1981). In Washington, the courts have interpreted the home rule powers of first class cities more narrowly. Professor Trautman perceptively characterized these limitations:

> The conclusion to be drawn is that in Washington a home rule city is subordinate to the legislature as to any matter upon which the legislature has acted, whether it be regarded as of state, local, or joint concern. In the event of an inconsistency, the statute prevails. However, in those instances in which the legislature has said nothing, an analysis of interests is vital. If the subject is of paramount state concern, some delegation of power by the legislature, express or implied, to the municipal corporation must be found. This is likewise true in those instances in which there is a joint state-local problem. Since the state will be affected by any action of the municipal corporation, it is necessary that an authorization to act from the legislature be found. In those instances in which the matter is solely of local interest, however, home rule cities may act without a delegation from the legislature, express or implied.

Trautman, *Legislative Control of Municipal Corporations in Washington,* 38 Wash.L.Rev. 743, 772 (1963). This court has applied that reasoning: "[t]herefore, at least when the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature." *Massie v. Brown,* 84

Wash.2d 490, 492, 527 P.2d 476 (1974). Thus, the question is whether the State has acted in a manner inconsistent with the powers asserted here; or, the State has not acted, but has either a paramount interest or a joint interest with local municipalities.

The development of generating facilities through the joint efforts of municipalities and other public bodies is a subject of at least joint state and local interest. As reflected in both legislative enactments, *e.g.*, RCW 54.44, and decisions of this court, *e.g.*, *Shorts v. Seattle*, 95 Wash. 538, 164 P. 241 (1917), the State is vitally interested in the diverse municipal powers that might be employed in this type of project. Because of the obvious state interest, either an express or implied delegation of power is necessary to find sufficient authority.

The holding in *Hillis* vitiates the arguments that this type of bond guaranty was a necessity to sell the bonds in the investment market. That may well be true, but necessity does not provide authority. Accordingly, we do not believe that this agreement is authorized as an implied power to pay for an admittedly proper municipal service.

IV. JOINT OPERATING AGREEMENTS

Another possible independent source of express power is the joint operating statutes under which WPPSS was created. RCW 43.52. As quoted previously, these provisions clearly authorize the participants to purchase "electric energy". RCW 43.52.410. By comparison, a joint operating agency is authorized to contract with any municipal corporation or public utility "for any term relating to the purchase, sale, interchange or wheeling of power". RCW 43.52.391. This difference in language indicates a critical distinction between the grants of authority to the participants and to WPPSS, because the city and PUD's authority is significantly more limited. If WPPSS were simply selling the electric energy, the participants obviously would be authorized to buy it. However, since the terms of the agreement encompass only a potential share of any electricity that might be generated, it is not accurate to analyze the participants' authority in terms of purchasing electric

energy. Since the statutes do not provide for the purchase of electric energy that may not be generated, we can discern no basis for the participants' authority in RCW 43.52.

V. JOINT DEVELOPMENT AGREEMENTS

A final category of express authority that could be involved in this type project, but was not employed in the present case, [5] is contained in the: "Nuclear, Thermal, Electric Generating Power Facilities—Joint Development", RCW 54.44. Under this statute, public entities explicitly are authorized to enter into agreements for the joint development of nuclear, thermal, or electric generating facilities. *See, e.g., PUD 1 v. Taxpayers of Snohomish Cy.,* 78 Wash.2d 724, 479 P.2d 61 (1971). Although there is no indication in the record as to why this chapter was not used, there are statutory requirements under RCW 54.44 notably absent from this agreement. For example, as joint developers the participants would have an ownership interest in any facility built. RCW 54.44.020. By comparison, the participants' only ownership interest under the present agreement is the right to share in the distribution of any excess assets at the termination of the project as set out in Section 13(a)(iii) of the Participants' Agreement. The participants do retain a share of project capability in an amount equal to their percentage share in the project, but as explained above, that share might amount to nothing, as it in fact does here. Also, no share could be sold without approval of 80 percent of the other participants. Moreover, even if they obtained consent to sell, a participant, according to the agreement, would remain liable for its obligation despite any assignment to another party.

A second statutory requirement under RCW 54.44 is that each participant is responsible only for its own debts and obligation in the facility. RCW 54.44.030. In contrast, section 17(c) of the Participants' Agreement explicitly requires that

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[5] Actually, WPPSS contracted under RCW 54.44 with Pacific Power & Light Company to give that private company a 10 percent ownership share of plant No. 5. The contracts with the remaining participants do not, however, involve that statute.

participants assume the obligations of defaulting participants. If any municipal participant defaults, the remaining municipal participants' share is automatically increased pro rata. Thus, a participant would expressly assume the debt of any defaulting participant. Since the record indicates that from the outset of the projects there were questions about the statutory authority of some 16 participants, it seems likely that the municipalities and PUD's would incur a greater obligation than they initially contracted for. Such an assumption of liability is expressly forbidden under the joint development provisions of RCW 54.44.030. In contrast, the South Carolina statute provides an example of express authority for such obligations:

> Any contract with respect to the sale or purchase of capacity or output of a project entered into between a joint agency and its member municipalities may also provide that if one or more of such municipalities shall default in the payment of its or their obligations with respect to the purchase of said capacity or output, then in that event the remaining member municipalities which are purchasing capacity and output under the contract shall be required to accept and pay for and shall be entitled proportionately to and may use or otherwise dispose of the capacity or output which was to be purchased by the defaulting municipality.

S.C.Code Ann. § 6-23-110 (Law.Co-op. Supp. 1982). Again, we have no such statute in this state.

Although other state courts have upheld such step-up provisions despite the lack of express statutory authority, *e.g.*, *Frank v. Cody*, 572 P.2d 1106, 1111-12 (Wyo. 1977), we are not persuaded that a similar conclusion is appropriate here. In *Cody* the court found the participants retained an ownership interest in the joint project and a significant role in managing the project. *Cody*, at 1111. Moreover, default may have been less likely since payments were only due after the utility services were delivered. *Cody*, at 1113-14. *Accord, Goreham v. Des Moines Metro Area Solid Waste Agency*, 179 N.W.2d 449, 457 (Iowa 1970). Here, the lack of an ownership interest coupled with the "dry hole" risk preclude a similar result.

It is instructive to review this court's previous analysis of a project based upon RCW 54.44 because it demonstrates the application of that statute to a viable project. In *PUD 1 v. Taxpayers of Snohomish Cy.*, 78 Wash.2d 724, 479 P.2d 61 (1971), we analyzed the joint development, by both public and private participants, of a coal-powered electric generating plant under the authority of RCW 54.44. Our decision concerned constitutional questions rather than statutory authority because the agreement was negotiated to conform to RCW 54.44. In challenging the agreement, appellants alleged that the PUD participants violated Const. art. 8, § 7 by giving or loaning credit in aid of their private coparticipants or by impermissibly owning stocks in a private corporation. This court found the arrangement valid under the constitution, reasoning that because under the statutory requirements the public participants were severally liable for their own acts and could not be assessed for the obligation of other participants, the public participants were not loaning or giving credit. *Snohomish Cy.*, at 726-27, 479 P.2d 61. As the court characterized the agreement: "[r]espondents are purchasing an ownership interest, and not only is their liability limited to their own acts, but their investment is restricted to an indebtedness proportionate to their individual participation." *Snohomish Cy.*, at 728, 479 P.2d 61. Those same procedural safeguards are not only absent from the present arrangement, they are explicitly contradicted under the step-up provision included in section 17(c) of the Participants' Agreement and the definition of project capability in section 1(v).

VI. CONCLUSION

We recently reaffirmed the application of the ultra vires doctrine in the area of government contracts. *Noel v. Cole,* 98 Wash.2d 375, 655 P.2d 245 (1982). As a general rule, the unauthorized contracts of governmental entities are rendered void and unenforceable under the ultra vires doctrine. *Noel,* at 378, 655 P.2d 245. The doctrine applies to government action to "protect the citizens and taxpayers . . . from unjust, ill-considered, or extortionate contracts, or those showing favoritism . . ." 10 E. McQuillin, *Municipal Corporations* § 29.02, at

200 (3d ed. 1981). Also, "[t]he rationale for the rule is the protection of those unsuspecting individuals whom the entity represents." *Noel,* at 378, 655 P.2d 245. In *Noel* this court held a logging contract between the State Department of Natural Resources and a private company ultra vires because of the parties' failure to conform to mandatory statutory procedures.

In the present case, the participants lacked substantive authority to enter into this type of contract because they constructed an elaborate financing arrangement that required the participants to guarantee bond payments irrespective of whether the plant was ever completed; to surrender ownership interest and considerable control to WPPSS; and to assume the obligations of defaulting participants. As such, these contracts failed to protect unsuspecting individuals, the ratepayers, represented by the participants. By choosing such an alternative arrangement in lieu of a statutory scheme that incorporated protections against those very liabilities, the participants exceeded their statutory authority, rendering the contracts ultra vires.

Although we have discussed our conclusions throughout the opinion, it is helpful to summarize. It should be apparent that this agreement does not satisfy the statutory scheme governing the public participants. (1) The agreement is not a standard contract for the purchase of power because the payments are due irrespective of whether any electric current is delivered. (2) It is not the type of acquisition or construction of a generating project authorized by the statutes or previously recognized by this court, because the participants retained no ownership interest, except in any excess assets upon termination, and a very limited role in management of the project. (3) It is not an exercise of an implied power to pay for municipal services because there was no guaranty the services would be provided and we perceive no legal necessity for such powers. (4) Finally, it is not a joint operating agreement within the provisions of RCW 43.52 because those provisions limit the participants' ability to buy anything more than "electric energy."

Our conclusion is that the Washington statutes authorize the participants to purchase power or to own electric generating facilities. An attempt to structure an agreement under the joint operating agency statutes or to base it upon implied powers does not alter that basic authority and the participants simply are not authorized to guarantee another party's ownership of a generating facility in exchange for a possible share of any electricity generated. Therefore, we hold that the Washington PUD's and Washington municipal participants lacked authority to enter into this agreement.

The trial court ruling that the Washington PUD's, cities and towns had authority to enter into this agreement is reversed.

WILLIAM H. WILLIAMS, C.J., ROSELLINI, DIMMICK and PEARSON, JJ., and MORGAN, J. Pro Tem., concur.

DORE, Justice (concurring).

I concur in the result reached by the majority. For the reasons discussed below, I am compelled to add my own analysis to that proffered by the majority.

I

I agree with the majority that "this court has never found authority for a project in which the participants did not have an ownership interest". Majority, at 336. Unlike the majority, however, I do not find it necessary to examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the "equivalent" of an ownership interest. Majority, at 337. "Ownership" has been defined as the "complete dominion, title, or proprietary right in a thing or claim". Black's Law Dictionary 997 (5th ed. 1979). I believe an ownership interest is an *absolute* requirement when acquiring or constructing generating facilities.

If the parties had wished to become co-owners of the projects, with the participants sharing in the benefits and burdens of ownership, they would have structured the contract according to RCW 54.44, governing joint ownership of nuclear

power plants. This is the statutory framework which governs the ownership agreement between Washington Public Power Supply System (WPPSS) and Pacific Power & Light Company (PP & L), which owns 10 percent of project 5. RCW 54.44, however, is not the statutory framework governing the relationship between WPPSS and the 88 participants. That relationship is governed by RCW 43.52. Under that chapter, WPPSS is authorized to construct and operate the projects and can sell electrical output to other utilities.

This court has held that the power to incur indebtedness cannot be inferred or implied from general statutory authority permitting municipalities to enter into contracts. In *Edwards v. Renton,* 67 Wash.2d 598, 409 P.2d 153 (1965), we made clear the need for express statutory authority for municipalities to enter into financial arrangements. As the present majority notes, other states have provided explicit statutory authority for unconditional guaranties such as the one in the present case. The Legislature of the state of Washington, however, has *not* provided our state with such statutory authority. Actual ownership is essential.

Under the "equivalent of ownership interest" analysis employed by the majority, project designers could conceivably allow enough democratic control by participants that there would be authority for a project which the participants did not actually own. I would hold that *both* an ownership interest *and* active participation in the management of the facilities is mandatory.

II

The dissent fails to address the constitution and statutes of this state which specifically limit the amount of indebtedness that a municipality can incur. Article 8, section 6 of the Washington State Constitution provides that a municipality shall not become indebted in an amount in excess of 1½ percent of the value of the taxable property of that municipality without the assent of ⅗ of the voters therein, nor under any circum-

stances incur indebtedness in excess of 5 percent of the value of the taxable property therein. The power of municipalities to incur indebtedness has been further circumscribed by the Legislature. RCW 39.30.010 and RCW 39.36.020(2), for example, prohibit cities incurring debt exceeding ¾ of 1 percent of their assessed property value without first obtaining permission from their citizens by a public vote.

By the terms of the Participants' Agreement, each participant committed itself to buy from WPPSS a share of "project capability". The price was a share of the cost of the project to WPPSS. For ten participant Washington cities, the share of the anticipated price which each committed itself to pay exceeded the debt allowable by law.[6] No public vote approved any of these undertakings.

The public policies behind these debt limitations are not in doubt. As stated in 56 Am.Jur.2d *Municipal Corporations* § 599, at 651 (1971):

> The clear and unmistakable purpose of such provisions is effectually to protect persons residing in municipalities or counties from the abuse of their credit and the consequent oppression of burdensome, if not ruinous, taxation.

Accord, 15 McQuillin *Municipal Corporations* § 41.02 (3d ed. 1970); *Gruen v. State Tax Comm'n,* 35 Wash.2d 1, 211 P.2d 651 (1949).

I am not persuaded by the trial court's determination that, because the obligations of the public utility district participants were payable out of electric utility revenues, they were exempt from constitutional scrutiny under the special fund doctrine. The trial court's rationale ignores the purpose of the special fund doctrine and provides a glaring loophole by which clever draftsmen could escape the constitutional debt restrictions.

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[6] These cities include Richland, Tacoma, Alder, Blaine, Centralia, Ellensburg, McCleary, Port Angeles, Steilacoom and Sumas. The magnitude of the commitments range from almost seven times the allowable debt in the case of Port Angeles to almost 36 times what the statutes would permit in the case of McCleary.

The special fund doctrine was last addressed by this court in *State ex rel. State Fin. Comm. v. Martin,* 62 Wash.2d 645, 661, 384 P.2d 833 (1963):

> That the special fund doctrine is a useful and valid tool of government is apparent when one thinks of all of the institutions and devices of government supported by it. But the true test of its application here is not what comes out of the fund, but what goes into it. If the revenues in it derive exclusively from the operation of the device or organ of government financed by the fund, as in the case of a toll bridge, or the operation of the State Liquor Control Board, or from sales or leases of publicly owned lands, any securities issued solely upon the credit of the fund are not debts of the state, but debts of the fund only. But if the state undertakes or agrees to provide any part of the fund from any general tax, be it excise or ad valorem, then securities issued upon the credit of the fund are likewise issued upon the credit of the state and are in truth debts of the state. *Hence, we must take care that the employment of peripheral doctrines does not lead us away from the main point of the case. What is a debt of the State of Washington? Any obligation which must in law be paid from any taxes levied generally is, we think, a debt of the state.* It matters little whether the tax be ad valorem or an excise. (Italics mine.)

Thus, the special fund doctrine is to be analyzed in terms of the purpose for the constitutional limitation. The employment of "peripheral doctrines," as noted above, should not detract from the primary purpose of concern: does the device employed create the evil the constitutional limitation was designed to avoid? If such is the case, there is "debt" for constitutional analysis purposes.

Traditionally this court has not applied the special fund doctrine mechanically. This point is illustrated by the case of *Twichell v. Seattle,* 106 Wash. 32, 179 P. 127 (1919), where the City of Seattle issued bonds to purchase an already existing street railway system as an addition to the city's railway system.

The City had pledged to pay the bonds out of the revenues of the city's entire railway system, not just out of that portion of the system being purchased by the proceeds of the bonds. Rather than applying a mechanical rule, the court focused on the risk to the taxpaying public. As the addition being purchased was already existing and operating in the hands of a private company, it was obvious this was not a speculative venture which might fail to materialize. Thus, the reason for the application of the debt limitation did not exist, and the obligation was not considered to be constitutional debt.

This court reached just the opposite result in *State ex rel. State Bldg. Fin. Auth. v. Yelle,* 47 Wash.2d 705, 289 P.2d 355 (1955). That case involved the State Building Financing Authority (Authority) which would purchase land, build buildings, then lease the buildings to various State departments and agencies for a rental fee designed to cover the debt service on bonds issued by the Authority to pay for the buildup. The Authority's sole source of income was the rentals for the buildings, and the bonds were payable out of those rental receipts. Applied mechanically, the special fund doctrine would not save the scheme from constitutional attack, because the debt was payable solely out of the revenues of the projects being financed. Yet this court looked to the substance of the transaction, rather than to its form. The court held that the special fund doctrine did not apply because some of the rents were paid out of general tax revenues. The court found the taxpaying public was taking the risk:

> When we strip the plan down to fundamentals, we find that it is not a leasing arrangement between landlord and tenant, but the installment purchase by the state of certain buildings and facilities with state moneys raised by taxation, far in excess of the constitutional limitation.

47 Wash.2d, at 715, 289 P.2d 355.

The facts of the present case are very similar to the State Building Financing Authority case. Here, WPPSS played the role of a financing conduit for the participants, just as the Authority was a financing conduit for the State. Just as the

Authority attempted to issue "revenue" bonds that were, in fact, secured by the Legislature's promise to appropriate funds adequate to pay debt service, so WPPSS has issued "revenue" bonds that are, in fact, secured by the participants' promise to collect funds adequate to pay debt service, notwithstanding the noncompletion of the facilities (plants 4 and 5). This court cannot insulate third party conduit financier schemes from the constitutional safeguard of the debt limitation.

III

Section 6(d)

The Participants' Agreement does not specify that the participants must pay for either decommissioning costs or debt service if the plants are not completed and operating. Section 6(d) provides that the participants must make the payments called for under the Agreement whether or not the projects are completed, but doesn't specify what payments are called for. The Agreement provides that the participants have to pay their respective shares of whatever is in the Annual Budget, as defined in Section 1(a) of the Agreement. The ultimate issue is whether the Annual Budget includes *debt service* and *decommissioning costs* if the projects are terminated before completion and before they go into operation generating electricity.

Debt Service

The bonds in question are "revenue" bonds, not general obligation bonds, and payable solely out of any revenues to be generated by the projects. If the projects for which revenue bonds are sold do not generate revenues, the bonds are not paid. The bonds themselves and the Bond Resolution clearly provide that, except for interest during construction, the bonds are payable solely out of revenues to be earned by WPPSS from the sale of "power and energy" (that is, electricity) from the plants. Because the plants are unfinished, there is no electricity to sell, and hence no revenues. There is no obligation to pay revenue bonds where there are no revenues.

It is not difficult to determine why the bonds were issued as revenue bonds rather than general obligation bonds. The statutes governing WPPSS allow it to issue revenue bonds "payable from the revenues of the utility properties operated by it" (RCW 43.52.3411) and expressly prohibit it from issuing general obligation bonds (RCW 43.52.391). The reason that the Legislature allowed WPPSS to issue revenue bonds but not general obligation bonds was to guard against precisely the situation now before this court: the economic, political and legal problem of asking the citizens of Washington and its neighboring states to pay billions of dollars for failed projects which will never produce any revenues. If the bonds were general obligation bonds, the risk of project failure would be on citizens who would have been entitled to vote on whether to undertake the project risks. Because the bonds are labeled as revenue bonds, however, the risk of project failure should be on the investors who bought the bonds knowing the sole source of payment was to be the revenues from the sale of electricity which was expected to be generated.

The Participants' Agreement must be read in light of the statutory framework governing WPPSS and the participants. If the parties had wished to become co-owners of the projects, with the participants sharing in the benefits and burdens of ownership (such as the risk of failure), they would have structured the contract according to RCW 54.44 governing joint ownership of nuclear power plants. That is the statutory framework which governs the ownership agreement between WPPSS and PP & L whereby WPPSS owns 90 percent and PP & L owns 10 percent of project 5. However, RCW 54.44 is *not* the statutory framework governing the relationship between WPPSS and the 88 participants. That relationship is governed by RCW 43.52, which does not allow WPPSS to put an ownership risk on the purchases of that electric energy.

Decommissioning Costs

As the projects were terminated before completion, decommissioning costs should be excluded from the Annual Budget as "costs of construction," and should be paid out of the construction fund provided, not by participants.

The trial court decided as a matter of law that the Agreement requires the participants to pay WPPSS for decommissioning costs as part of the Annual Budget. That is plainly contrary to the clear language of the Agreement and Resolution.

The Annual Budget excludes "costs of construction as defined in the Bond Resolution". Section 1(a) of the Agreement, at 3 and 4. Section 6.9J of the Bond Resolution, at pages 46 and 47, specifically includes as a cost of construction:

> The *costs of decommissioning* any Project terminated prior to the [completion of construction], which costs shall include but shall not be limited to all of the System's accrued costs and liabilities, including cost of Fuel, of such Project and the salvage, discontinuance and disposition thereof . . . (Italics mine.)

Costs of decommissioning the projects if they are terminated prior to completion are "costs of construction as defined in the Bond Resolution" and, therefore, are excluded from the Annual Budget. Section 6.9J of the Bond Resolution, at 46; Section 1(a) of the Participants' Agreement, at 3.

The trial court's reasoning ignores the fundamental scheme of the Participants' Agreement and Bond Resolution and is contrary to the plain language of the documents. The Resolution explicitly provides that (1) costs of construction shall be paid from moneys in the construction fund (section 6.9, at 44); (2) the moneys in the construction fund shall come from the sale of bonds (section 6.8, at 43), and (3) WPPSS will sell enough bonds to pay all costs of construction (section 3.2 at 17). WPPSS' chief New York bond lawyer, who drafted the documents, testified:

> Q. Where does the money come from that gets into the construction fund?
>
> A. From bond proceeds.
>
> Q. As you interpret the bond resolution does any money which the participants are to pay to the Supply System ever get into the construction fund?

A. I don't believe so.

* * * * *

Q. Does the bond resolution provide that . . . all costs of construction are to be paid from monies in the construction fund?

[Objection]

A. Yes.

Clerk's papers, at 705-06.

When they signed the Participants' Agreement in 1976, the participants agreed to pay for items properly includable in the Annual Budget but not for "costs of construction," which were expressly *excluded* from the Annual Budget. The exclusion was no accident: the exclusion language was specifically *added* to earlier drafts of the Agreement to insure that the participants would not have to pay such costs.

The draft of September 24, 1974, shows the following handwritten note made by one of WPPSS' lawyer-draftsmen next to the construction cost exclusion:

> make sure annual budget only include[s] costs of ea. project after D. of Co. Op. [Date of Continuous Operation, i.e., completion] or date certain [July 1, 1988].

Clerk's papers, at 4373. Thus, if there is any doubt about the parties' intent, the extrinsic evidence from the files and testimony of WPPSS' own lawyers who drafted the documents shows that precompletion costs, such as costs of decommissioning uncompleted plants which by definition are "costs of construction," were intended to be *excluded* from the Annual Budget. They were to be paid from bond proceeds in the construction fund, not by the participants.

The costs of "termination" are mentioned in the second sentence of the definition of "Annual Budget". It provides for "costs . . . resulting from the ownership, *operation* and *maintenance* of the Projects, repairs, renewals, replacements, and additions thereto and costs of termination thereof as provided in Section 13". (Italics mine.) Participants' Agreement, at 4. It

is clear from the context that the sentence refers to *completed* plants. Only completed plants have operation and maintenance costs, or need repairs, renewals, replacements or additions.

Moreover, if the reference to costs of "termination" was construed to embrace precompletion decommissioning costs, there would be an absolute and unavoidable contradiction between the first sentence (which excludes precompletion decommissioning costs as "costs of construction") and the second sentence. If possible, an agreement should be interpreted in a way which will avoid such inherent contradictions.

Thus, all costs of construction as defined in the Bond Resolution, such as costs of decommissioning uncompleted plants, are excluded from the Annual Budget because they are to be paid out of the bond proceeds in the construction fund, not by the participants. Additionally, costs of "termination . . . as provided in section 13" are included in the annual budget only after a project has been completed and has gone into operation before being terminated. Accordingly, I strongly disagree with the trial court's conclusion that as a matter of law the Agreement unambiguously includes the costs of decommissioning uncompleted plants in the Annual Budget.

Even if decommissioning costs were payable under section 13 of the Agreement, they are not payable until WPPSS renders a final accounting statement. As costs of decommissioning uncompleted plants are to be paid out of the construction fund, not by the participants, the participants can be called upon to pay decommissioning costs only after a plant has been completed and has gone into operation before being terminated. Once a plant is completed, the costs of decommissioning it would no longer be a "cost of construction" under section 6.9J of the Bond Resolution. Hence, the decommissioning costs would not be payable out of the construction fund and would have to be paid by the participants under section 13 of the Participants' Agreement.

Section 13(a)(iii), however, clearly provides that decommissioning costs are payable by the participants only after WPPSS renders a "final accounting statement" at the end of the decommissioning process. The monthly accounting

statements required under section 13(a)(ii) are for reporting purposes only. Significantly, the earlier drafts of the Agreement (Clerk's papers, at 4283, 4321, 4357, 4399, 4452 and 4548) all required monthly payments based on the monthly accounting statements, but the drafts of February 27, 1975 and later deleted the monthly payments and based the payments solely on the final accounting statement. Clerk's papers, at 4602 and 4768, and Agreement section 13(a)(ii) and (iii). Presumably, the Agreement does not require participants to pay for decommissioning costs until the final accounting statement is rendered because it cannot be known until then whether the ultimate result of decommissioning will be a debit or credit for the participants.

Thus, as discussed above, the section 13 payment provisions do not apply in the present context or precompletion decommissioning. Even if they did apply, the participants would not have to pay for decommissioning costs until WPPSS had rendered a final accounting statement at the end of the decommissioning process.

Conclusion

From reading the record, it is clear that the monumental crisis brought on by WPPSS was created by the simultaneous construction of five nuclear plants, as well as mismanagement. To save itself, WPPSS has asked us to approve a plan to mortgage the futures of ratepayers by requiring huge increases in electricity rates, in exchange for nothing, in violation of our statutes and state constitution. This we cannot do.[7]

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[7] Citing RAP 13.7, writer of the dissenting opinion limits himself to the statutory authority questions presented by the parties. I do not find RAP 13.7 applicable, as it specifically pertains only to issues to be considered by this court upon acceptance of review of a Court of Appeals' decision. Even if applicable, however, RAP 13.7 permits this court to limit the issues only at the time of the granting of the motion or petition, not after oral presentation. I find it impossible to discuss statutory authority without interpreting the Participants' Agreement and Bond Resolution, including section 6(d). The contract interpretation and statutory authority issues are so intertwined it is necessary to address the interpretation issues in determining the authority issues.

I concur in the result of the majority.

UTTER, Justice (dissenting).

I dissent. The majority, by its narrow reading of municipal authority to provide electric power, places constraints on municipalities not intended by the Legislature. Municipal authority in this area must be read broadly to provide the flexibility which is absolutely crucial in furnishing such a capital-intensive service. The contractual arrangement in the present case is a form of purchase which, viewed at the time the contract was made, may well have been the most economically advantageous for all concerned. While the result has been tragic, the decision here today may not free municipalities of all potential costs in even the present case, will bar them from potentially advantageous contracts in the future, and may well make financing of future projects more costly.

It is natural for anyone viewing the enormity of the mismanagement in this project and the calamitous impact of its failures on utilities and ratepayers to seek ways to negate the impact. Nonetheless, I cannot agree that the approach taken by the majority is either a proper or necessary way to solve the problem.

Initially, it is important to characterize exactly what it is that the participants contracted for. As the majority points out, the contract cannot be characterized as purchase of an ownership interest in a power plant, for the interest held by the participants lacks several important indicia of ownership. Neither does the contract represent a purchase, in the ordinary sense, of actual electric power, for it expressly provides for the possibility, which in fact has materialized, that no power would be produced.

Instead, the contracts are best characterized as a purchase of a *possibility* of power. In return for consideration in the form of guaranty of the revenue bonds, the participants received not guaranteed power but an exclusive right to power which might or might not materialize. The advantage to the participants was that this power might be significantly cheaper than available alternatives or might even be the *only* alternative available.

While the contract has the disadvantage of requiring payment for a potential "dry hole", this is true of other standard contracts as well. For example, the buyer in an option contract may well end up paying something for nothing if, when the time comes for it to exercise the option, it chooses not to do so because the terms are no longer economically advantageous.

The majority concedes, as it must, that all of the participants have the authority to "enter into contracts or compacts . . . for the purchase and sale of electric energy". RCW 43.52.410. The issue before us is whether a proper construction of this language includes the purchase of a possibility of electric power. The majority simply concludes that it does not. I find the issue more difficult.

Statutes such as RCW 43.52.410 are to be liberally construed so as to further their purpose of furnishing power to the people. *State ex rel. PUD 1 v. Wylie,* 28 Wash.2d 113, 146, 182 P.2d 706 (1947); RCW 43.52.910 *See generally Pacific Cy. v. Sherwood Pac., Inc.,* 17 Wash.App. 790, 795, 567 P.2d 642 (1977) (statutes relating to the public health and welfare should be liberally construed). As was noted by another court in a similar case:

> The legislature has clearly pointed up that it intended to extend liberally to municipal electric utilities the same benefits and efficiency available to other utilities, through combined ownership of a generating system. It would be an impossible and impracticable demand for us to insist on the legislature providing every little detail on how to go about carrying out an authority bestowed. In the absence of some good reason to do so, we should not apply a construction which would nullify, destroy or defeat the intention of the legislature.

Frank v. Cody, 572 P.2d 1106, 1115 (Wyo. 1977).

In light of this rule of liberal construction, I believe this court should construe RCW 43.52.410 to authorize purchase of a possibility of power as well as more typical purchase contracts. Such contracts may in some circumstances be highly

advisable. Option contracts, especially when used in an unpredictable market in which periodic gluts and shortages are common, are a good example. Several years ago, for example, a municipality operating an oil-burning power plant seemingly might have been well advised, in the face of escalating oil prices, to enter a long-term contract to purchase oil at the then prevailing price. Yet in light of recent price declines, such a contract would have left the municipality bound to pay significantly more than the current price. The solution—an option contract which would permit the municipality, by exercising its option, to avoid any price increases and yet still, by choosing not to exercise its option, take advantage of any price declines.

The purchase of a possibility of power in the present case no doubt seemed equally advisable in 1974, when steadily rising energy prices were predicted and the costs of the proposed power plants seemed manageable. That a loose market and other economic factors made completion of the plants infeasible and required their termination is no different from a fall in oil prices which might make the hypothetical purchase option described above economically worthless. The participants are no more entitled to a refund of their consideration here, *i.e.*, relief from their bond guaranties, than they would be entitled to a refund of the consideration paid for the option contract. As RCW 43.52.410 should permit option contracts, so it should permit agreements such as that in the present case.

Further support for this conclusion is provided by the Legislature's failure to react at all to the well publicized contracts at issue here. WPPSS is a public entity which is purely a creature of statute. *See* RCW 43.52. Legislative acquiescence in such an entity's interpretation of the statutes under which it operates is a significant indication of legislative intent. *Cf. Washington Educ. Ass'n v. Smith*, 96 Wash.2d 601, 606, 638 P.2d 77 (1981) (legislative acquiescence in Attorney General interpretation); *Spokane Methodist Homes, Inc. v. Department of Labor & Indus.*, 81 Wash.2d 283, 287, 501 P.2d 589 (1972) (legislative acquiescence in court interpretation); *Morin v. Johnson*, 49 Wash.2d 275, 279, 300 P.2d 569 (1956)

(legislative acquiescence in interpretation by administrative agency). The various purchasers of bonds undoubtedly relied on legislative acquiescence in this case.

Other courts which have considered the validity of contracts containing comparable "dry hole" provisions have reached conclusions similar to mine. While most of those cases are factually distinguishable, they are unanimous in upholding such provisions. *See Board of Comm'rs v. All Taxpayers, Property Owners, & Citizens,* 360 So.2d 863 (La. 1978); *State ex rel. Mitchell v. Silkeston,* 555 S.W.2d 281 (Mo.1977); *Johnson v. Piedmont Mun. Power Agency,* 277 S.C. 345, 287 S.E.2d 476 (1982); *State ex rel. Grimes Cy. Taxpayers Ass'n v. Texas Mun. Power Agency,* 565 S.W.2d 258 (Tex.Civ.App. 1978); *Frank v. Cody, supra. State ex rel. Mitchell v. Silkeston, supra,* actually involved a fact situation almost identical to that in the present case. There, four cities entered into contracts with a neighboring city whereby they agreed to pay for a specified quantity of electric power whether or not actually needed *and whether or not actually available. Mitchell,* at 283-84. Despite this "dry hole" provision and a complete lack of any ownership interest at all, the court did not even question the authority of the purchaser cities. *See Mitchell,* at 291.

We should reject the majority's narrow interpretation of RCW 43.52.410. Municipalities exercising their authority to provide electric power to their citizens must be given the freedom and flexibility to use all advisable means. Their determinations of advisability, moreover, are not subject to judicial review, except to the extent that they are arbitrary and capricious. *See State ex rel. PUD 1 v. Schwab,* 40 Wash.2d 814, 829-31, 246 P.2d 1081 (1952). I would hold that the participants did possess authority to enter into the contracts at issue here.

I will not respond to the concurring opinion. There are compelling reasons for determining the issues of law addressed in that opinion in a different manner. Some of these were stated by the trial court, others were presented to us in oral argument and in the briefs of the parties.

Because the majority has deliberately chosen to refrain from addressing these remaining issues (*see* majority opinion, at page 334 n.1), I do so as well. However, our silence should not be mistaken for acquiescence in the views of the writer of the concurring opinion. RAP 13.7(b) expressly authorizes us to limit the issues which we address in reviewing an opinion of the Court of Appeals and this must encompass the power to so limit our review at any time prior to issuing a decision. While RAP 2.4, which governs direct discretionary review, does not expressly allow such limitation, such power must be implied in light of RAP 13.7(b) and the nature of discretionary review. *See also* RAP 18.8(a) (appellate court may waive or alter rules of appellate procedure). To hold otherwise would allow a party seeking discretionary review to force an appellate court to choose between reviewing none or all of numerous issues that party might present. This would conflict with the basic concept of discretionary review, that it is discretionary.

I dissent.

DOLLIVER, J., concurs.

APPENDIX C

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,

Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,

Defendants.

NO. 82-2-06840-3

Order Denying Motion For Reconsideration of Order And Judgment

This court entered an Order and Judgment on August 11, 1983. Thereafter Chemical Bank filed a motion for reconsideration of the Order and Judgment. On August 23, 1983 the Supply System joined in Chemical's motion for reconsideration. Various defendants filed memoranda opposing the motion for reconsideration, and on August 29, 1983 Chemical filed a reply memorandum in support of its motion for reconsideration. This court permitted counsel for Chemical Bank to present oral argument in support of its motion at a hearing on August 29, 1983. The Court having read and duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein, and the court having announced its oral decision on the aforesaid motion at the hearing on August 29, 1983 following the presentation of oral argument by Chemical Bank, now, therefore, for the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

ORDERED as follows:

1. The aforesaid motion by Chemical Bank, joined in by the Supply System, for reconsideration of this court's Order And Judgment entered on August 11, 1983, is hereby denied; and

2. The arguments and contentions raised by Chemical Bank in support of its motion for reconsideration, including but not limited to its arguments and contentions regarding alleged violations of the United States Constitution and of the Constitution of the State of Washington (and constitutions of other states where defendants are located), are hereby rejected for the reasons stated in the court's oral decision.

DONE IN OPEN COURT this 16th day of September, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK, a New York corporation, Plaintiff, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al., Defendants.	NO. 82-2-06840-3 **Appendix To Order Denying Motion For Reconsideration Of Order And Judgment**

The court has considered the following pleadings, papers and materials in reaching its Order Denying Motion For Reconsideration Of Order And Judgment:

Name of Document	Date
(Chemical Bank's) Motion for Reconsideration	August 18, 1983
Memorandum of Chemical Bank in Support Of Its Motion For Reconsideration Of The Judgment	August 18, 1983
Note For Motion Docket (regarding Motion For Reconsideration Of Order And Judgment Entered August 11, 1983)	August 18, 1983
Supply System's Motion For Reconsideration and Joinder in Chemical Bank's Motion For Reconsideration	August 23, 1983
Columbia Defendants' Memorandum In Opposition To Chemical Bank's Motion For Reconsideration	August 25, 1983
Memorandum of Nine Defendants In Opposition To Chemical Bank Motion For Reconsideration of The Judgment	August 25, 1983
Response of 21 Defendants To Plaintiff's Motion For Reconsideration Of Judgment	August 25, 1983

Name of Document	Date
Memorandum of City of Richland, Chelan County PUD No. 1 And Grant County PUD No. 2 In Opposition To Motion of Chemical Bank For Reconsideration	August 25, 1983
(Washington Public Utilities Group) Opposition To Motion For Reconsideration Of The Judgment	August 26, 1983
Oregon PUDs' Memorandum in Opposition to Chemical Bank's Motion For Reconsideration	August 26, 1983
Memorandum Of City of Ellensburg, Public Utility District No. 1 of Wahkiakum And Public Utility District No. 1 of Pend Oreille In Opposition To Motion For Reconsideration	August 26, 1983
Response of Snohomish and Clallam Public Utility Districts To Memorandum of Chemical Bank In Support Of Motion For Reconsideration	August 26, 1983
Chemical Bank's Reply Memorandum On Its Motion For Reconsideration	August 29, 1983

The court previously considered the pleadings, papers and materials listed in the Appendix to Order And Judgment dated August 11, 1983.

DONE IN OPEN COURT this 16 day of September, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for
Columbia Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK OF NEW YORK,

Plaintiff,

vs,

No. 82-2-06840-3

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.,*

Defendants.

VERBATIM REPORT OF PROCEEDINGS

BEFORE

THE HONORABLE JOSEPH COLEMAN

9:30 a.m.
August 29, 1983
King County Courthouse
Seattle, Washington

KATHY BRINKER
Official Court Reporter

THE COURT: Do we have everyone? The Court has found the reference that it wanted to find in the Chemical Bank case and I have reviewed it. Upon reviewing it I don't think it merits the question that I was intending to ask.

The Court will not invite further oral argument with respect to this matter. The motion for reconsideration will be denied. I have concerns with respect to timeliness and I will address the merits.

I am concerned, with respect to timeliness, for several reasons. I appreciate that when the case commenced it was thought that the issue would relate to authority and other issues that were raised. The Supreme Court's decision found that there was not authority, and it is interesting to note that the issues that are now being urged by Chemical Bank were at least suggested in the motion for reconsideration before the Supreme Court, both federal and state constitutional grounds were urged. This was not accompanied with detailed argument or citation of authority. It certainly was not as detailed as it is now, in front of this Court, on the motion for reconsideration, but nevertheless the question was raised and squarely put before the Supreme Court. They chose not to invite further argument. They chose not to address those particular issues in denying the motion for reconsideration; in effect the Supreme Court was indicating, insofar as this issue was concerned, the matter was over.

Now, there have been proceedings in this Court following that decision in which this Court was required to interpret its language and enter certain orders. As I indicated at that time I felt that virtually everything that this Court said with respect to those issues was directly controlled by and compelled by the Supreme Court decision in *Chemical Bank versus the Supply System, et al.* I still feel that way.

I think there are several problems with respect to the constitutional issues that are being advanced, and I think there are several problems with the arguments that the ultra vires doctrine and these particular issues can be reconciled so that they are in harmony and not in conflict. It's important to consider again the nature of the arrangement in this case. The bondholders advanced funds and those funds were advanced to the Supply System. The Supply System was obligated to repay

those funds with interest and they are still obligated to repay those funds with interest.

The difficulty, of course, it that the Supply System, insofar as Projects 4 and 5 is concerned, is now insolvent. They do not have any funds to pay this obligation, but the obligation between the bondholders at all times was an obligation between the Supply System and the bondholders. The bondholders were indeed examining security and were indeed giving consideration to how the Supply System would receive its funds. Every one was of the view hopefully that the funds would be received through the generation of electricity and payments thereon.

But in any event, what we have here is the Supply System obligated, we have a separate third-party agreement, the Participants' Agreement that talks in terms of obligations between the participants and the Supply System. It is those agreements that the Supreme Court found to be ultra vires as exceeding the powers of the Washington municipalities and PUD's. Based upon that, further arguments were heard and the Court ruled that that decision inevitably led to the conclusion that the Participants' Agreement in its entirety was unenforceable for several grounds. Failure to fulfill a conditions precedent to the obligation to the participants to perform; mistake of facts; frustration of purpose which existed from the beginning so as to create a situation where no duty to perform ever arose.

I'm reluctant to discuss in any more detail than has already been discussed the concept of risk, but I think it's inevitable that the Court give some attention to that. Obviously when a party advances funds and is looking to a third party to provide a guarantee or to be the security, one has to give consideration as to whether or not that security instrument is valid. In this instance it was determined that that security was not valid, so what has happened is that the bondholders are in a position where they can only look to the Supply System. It was the Supply System to which they forwarded the funds. The Supply System unfortunately at this stage is not in a position to repay that obligation.

Now, when we look to the obligation of the participant utilities we find that that obligation has been discharged, and it

has been discharged because of the Supreme Court's decision finding some 70 percent of the utilities to have been without authority to enter into the undertaking in the first instance.

I acknowledged the difficult problem with restitution when the matter was before the Court in the motions for entry of judgment, motions for summary judgment. If there was an existing fund then that could be returned, if the Supply System was in possession of the funds that had been advanced by the bondholders, the bondholders would have a claim to those funds. Had the participants received funds or the substantial equivalent of funds, restitution might well be available from them. However, the only way the Court could require participants to pay anything at this stage would be to in effect require them to enforce the agreement. The agreement has been found to be unenforceable.

I don't believe the constitutional principles are applicable here. In the first place it's virtually conceded that the contract law is not implicated. Judicial decisions do not have the effect of impairing the obligations of contracts. Even if we were to assume that the Supreme Court provided a new or different interpretation to the statutes in question, that would not suffice because of the principle of law that indicates that when a court construes a statute, even in situations where the construction is altered, it is as if the statute always so provided.

Beyond that, as the participants have argued in their briefs, parties entering into a contract do so subject to current law. Now, indeed, this reasoning is difficult for a number of people; it's difficult for the Court. The Court obviously viewed the question of authority differently than the Supreme Court has viewed it; the Court is not necessarily persuaded that its view was incorrect. The fact of the matter is that the Supreme Court has made a decision, we're all bound by it, and we must make decisions consistent with that decision, whether we're in agreement with its rationale or not.

Again, if one reads the Chemical Bank decision one can see what the Court is saying with respect to the effect of enforcing the agreement. Basically indicating that the agreement cannot be enforced as against the various utilities and their ratepayers. To in effect now say that they are required to make these payments on the arguments that are being offered

by Chemical Bank is simply to enforce the contract through a different avenue.

Now, the Court has specifically indicated that there may be other theories. There may be tort theories, and if I understand correctly those are being litigated in another form. That is an entirely different matter, and the Court has not passed upon those issues, but that is not before the Court. What the Court is passing upon here is the question of enforcing the contract, and Chemical Bank in effect is asking the Court, notwithstanding the Supreme Court decision, to find some means of enforcing the contracts on a contractual theory or on a restitution theory, that pursuant to the contract sums were advanced and now those sums should be returned. There is not a taking here. There is not governmental action that results in a taking; therefore that particular principle to the Court does not appear to be applicable.

Again the parties entered into an arrangement. The bondholders invested money, they did that directly with the Supply System. The various agreements that the Supply System entered into in terms of ensuring their ability to pay have been found to be invalid. That is the risk I think under these circumstances the bondholders were taking, and unfortunately things did not work out the way everyone contemplated that they would.

For the various reasons indicated, I do not believe this Court can at this time grant the relief Chemical Bank is seeking, and I think relief of this nature would require some provision, modification or alteration of the Supreme Court decision. And those are issues that must be addressed to the State Supreme Court and/or the federal judiciary, if this case reached the federal judiciary at some point in time.

For the reasons indicated the motion to vacate judgment, the motion to reconsider the order previously entered will be denied.

APPENDIX D

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,
Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,
Defendants.

No. 82-2-06840-3

Order and Judgment

On June 15, 1983 the Washington Supreme Court filed an Opinion on discretionary review of certain orders entered by this court on November 16, 1982 and January 4, 1983. Plaintiff Chemical Bank ("Chemical") and defendant Washington Public Power Supply System ("WPPSS") thereafter filed a motion for reconsideration. On July 22, 1983 the Washington Supreme Court entered its Order Denying Motion For Reconsideration and issued its Mandate directing this court to proceed in accordance with the June 15, 1983 Opinion.

Following the announcement of the Washington Supreme Court's Opinion on June 15, 1983, the various defendants listed in Exhibit A attached hereto (hereinafter called the "moving defendants") filed motions in this court for summary judgment or entry of judgment or filed joinders in such motions.

Oral argument on the motions was heard before the undersigned judge of this court on August 8, 1983. All parties and their counsel were given an opportunity to present their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix attached hereto and by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions on August 9, 1983. For the reasons set forth in the court's oral decision, a copy of which is attached hereto and by this reference incorporated herein, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. In compliance with the mandate of the Washington Supreme Court, the defendants which are Washington public utility districts or Washington municipalities lacked authority to enter into said Agreement and as to them the Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable;

2. Inasmuch as the Participants' Agreement is *ultra vires*, void *ab initio*, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability.

3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the "Bond Resolution"), to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS in connection with the Projects;

4. The defenses, arguments, objections and contentions raised by Chemical and WPPSS in opposition to the aforesaid motions for summary judgment or entry of judgment, including but not limited to any defenses, arguments, objections or contentions relating to estoppel, waiver, laches, ratification, restitution, unjust enrichment,

Article 8 of the Uniform Commercial Code or alleged control by participants of affairs relating to the Projects, are hereby rejected and overruled for the reasons stated in the court's oral opinion;

5. Chemical's complaint for declaratory relief is dismissed, with prejudice, and the moving defendants are to be awarded their taxable costs against Chemical and WPPSS; and

6. There is no just reason for delay in entering this Order And Judgment, which is hereby expressly directed to be entered pursuant to CR 54(b).

DONE IN OPEN COURT this 11th day of August, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia Defendants

Approved as to form:

BETTS, PATTERSON & MINES

By /s/ MICHAEL MINES by JPS

Michael Mines
Attorneys for Chemical Bank

GORDON, THOMAS, HONEYWELL,
MALANCA, PETERSON & O'HERN

By /s/ ALBERT R. MALANCA

Albert R. Malanca
Attorneys for Washington Public
Utility Group

EXHIBIT A

Columbia Defendants:

Columbia Rural Electric Association, Inc.
Blachly-Lane County Cooperative Electric Association
Central Electric Cooperative, Inc.
Columbia Basin Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative, Inc.
Hood River Electric Cooperative
Lane Electric Cooperative, Inc.
Midstate Electric Cooperative, Inc.
Salem Electric
Umatilla Electric Cooperative Association
Wasco Electric Cooperative, Inc.
Kootenai Electric Cooperative, Inc.
Fall River Rural Electric Cooperative, Inc.
Lost River Electric Cooperative, Inc.
Raft River Rural Electric Cooperative, Inc.

21 Defendants:

City of Bandon
City of Bonners Ferry
City of Burley
Clearwater Power Company
Elmhurst Mutual Power & Light
Glacier Electric Cooperative
City of Heyburn
Idaho County Light & Power
City of Idaho Falls
Northern Lights, Inc.
Ohop Mutual Light
Okanogan County Electric Cooperative
Parkland Light & Water Co.
Prairie Power Cooperative
City of Rupert
Rural Electric Association

Unity Light & Power
Wells Rural Electric
City of Centralia, Washington
City of Port Angeles, Washington
Town of McCleary, Washington

9 Defendants:

Big Bend Electric Cooperative, Inc.
City of Milton-Freewater, Oregon
Lincoln Electric Cooperative, Inc.
Missoula Electric Cooperative, Inc.
Ravalli County Electric Cooperative, Inc.
Salmon River Electric Cooperative, Inc.
Tanner Electric Cooperative
Vera Irrigation District No. 15
Vigilante Electric Cooperative, Inc.

Oregon PUDS:

Central Lincoln People's Utility District
Clatskanie People's Utility District
Northern Wasco County People's Utility District
Tillamook People's Utility District

Washington Public Utilities Group:

Public Utility District No. 1 of Benton County
Public Utility District No. 1 of Clark County
Public Utility District No. 1 of Cowlitz County
Public Utility District No. 1 of Grays Harbor County
Public Utility District No. 1 of Lewis County
Public Utility District No. 1 of Mason County
Public Utility District No. 3 of Mason County
Public Utility District No. 1 of Okanogan County
Public Utility District No. 2 of Pacific County
Public Utility District No. 1 of Skamania County
City of Tacoma, Washington

Others:

Benton Rural Electric Association
City of Springfield
City of McMinnville
Lower Valley Power & Light, Inc.

City of Canby, Oregon (Canby Electric Board)
City of Cascade Locks, Oregon
City of Drain, Oregon
Orcas Power and Light Company
Alder Mutual Light Company
Nespelem Valley Electric Cooperative, Inc.
Town of Steilacoom, Washington
Public Utility District No. 1 of Franklin County
City of Blaine, Washington
Public Utility District No. 1 of Klickitat County
City of Sumas, Washington
Public Utility District No. 1 of Clallam County
City of Ellensburg, Washington
Public Utility District No. 1 of Wahkiakum County
Public Utility District No. 1 of Pend Oreille County
City of Richland, Washington
Public Utility District No. 1 of Chelan County
Public Utility District No. 1 of Grant County
Public Utility District No. 1 of Snohomish County
Public Utility District No. 1 of Douglas County
Inland Power & Light Company

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation, *Plaintiff,* *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al., *Defendants.*	No. 82-2-06840-3 Appendix to Order and Judgment

The court has considered the following pleadings, papers and materials in reaching its Order And Judgment of even date herewith:

	Name of Document	Date
1.	NOTE FOR MOTION DOCKET FOR MOTION TO LIFT THE RESTRAINING ORDER	6/22/83
2.	CHEMICAL BANK'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT THE STAY	6/22/83
3.	NOTE FOR MOTION DOCKET FOR MOTION FOR SUMMARY JUDGMENT BY DEFENDANT CITIES OF CENTRALIA, PORT ANGELES AND TOWN OF MCCLEARY	6/24/83
4.	NOTICE OF MOTION FOR ENTRY OF JUDGMENT.	6/30/83
5.	WASHINGTON PUBLIC UTILITIES GROUP'S MOTION FOR ENTRY OF JUDGMENT DISMISSING ALL CLAIMS AGAINST THE GROUP'S MEMBERS	6/30/93
6.	MEMORANDUM OF WASHINGTON PUBLIC UTILITIES GROUP: (1) IN SUPPORT OF MOTION FOR ENTRY OF JUDGMENT DISMISSING CLAIMS; (2) IN SUPPORT OF MOTION FOR ORDER AUTHORIZING WITHDRAWAL OF ESCROW FUNDS; AND (3) IN RESPONSE TO CHEMICAL BANK'S MOTION TO LIFT ORDER RESTRAINING DECLARATION OF DEFAULT	6/30/83

	Name of Document	Date
7.	CHEMICAL BANK'S OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT AND MOTIONS FOR ORDER ALLOWING WITHDRAWAL OF FUNDS FROM ESCROW ACCOUNT	6/30/83
8.	OPPOSITION OF SUPPLY SYSTEM TO MOTIONS (1) TO WITHDRAW MONEY FROM THE ESCROW FUND, (2) FOR ENTRY OF FINAL SUMMARY JUDGMENT, AND (3) TO LIFT THE RESTRAINING ORDER	6/30/83
9.	JOINDER BY LOWER VALLEY POWER AND LIGHT, INC. IN MOTIONS FOR SUMMARY JUDGMENT	7/11/83
10.	COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
11.	COLUMBIA DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	7/11/83
12.	APPENDIX TO COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
13.	JOINDER BY BENTON RURAL ELECTRIC ASSOCIATION IN COLUMBIA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
14.	NINE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	7/11/83
15.	MEMORANDUM OF NINE DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	7/11/83
16.	AFFIDAVIT OF WILBUR L. ANDERSON	7/11/83
17.	AFFIDAVIT OF JOSEPH W. CUSTER IN SUPPORT OF MOTION	7/11/83
19.	AFFIDAVIT OF LARRY GORDON	7/11/83
20.	AFFIDAVIT OF SALMON RIVER ELECTRIC COOPERATIVE, INC. IN SUPPORT OF MOTION TO DISMISS (TED C. SPRINGER)	7/11/83
21.	AFFIDAVIT OF GARY D. MASON	7/11/83
22.	AFFIDAVIT OF DANIEL B. BAILEY	7/11/83
23.	SUPPLEMENTAL AFFIDAVIT OF HERB SAAGER	7/11/83
24.	AFFIDAVIT OF MELVIN M. LYON	7/11/83
25.	AFFIDAVIT OF HERB SAAGER	7/11/83

	Name of Document	Date
26.	AFFIDAVIT OF BOYD RESSEL, MANAGER OF LINCOLN ELECTRIC COOPERATIVE, INC., DAVENPORT, WASHINGTON,.....	7/11/83
27.	AFFIDAVIT OF KENNETH D. CARPENTER ON BEHALF OF BIG BEND ELECTRIC COOPERATIVE, INC., RITZVILLE, WASHINGTON	7/11/83
28.	AFFIDAVIT OF BYRON WAGNER.....	7/11/83
29.	AFFIDAVIT OF MICHAEL F. SCHUMACHER	7/11/83
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In addition, in reaching said Order And Judgment the court has previously read and considered the pleadings, papers and materials listed in (1) the Appendix to Order on Motions for Summary Judgment, dated November 16, 1982, and (2) the Order Approving Appendix And Supplement To Appendix To First Supplemental Order On Motions For Summary Judgment, dated May 4, 1983, and the Appendix and Supplement to Appendix approved and incorporated therein.

DONE IN OPEN COURT this 11th day of August, 1983.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca
Attorneys for Columbia
Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK OF NEW YORK,

Plaintiff,

VS.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Defendants.

No. 82-2-06840

ORAL DECISION

BY

THE HONORABLE JOSEPH COLEMAN

9:00 a.m.

August 9, 1983

King County Courthouse

Seattle, Washington

KATHY BRINKER
Official Court Reporter

APPEARANCES

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PROCEEDINGS

THE COURT: Good morning. Please be seated. Anyone have any final dispositive thoughts this morning?

The Court has reviewed your briefs, the affidavits that have been attached in support of the memoranda. The Court has considered the agruments that have been observed in support of your respective positions.

The first issue the Court will address is entry of judgment with respect to the Washington PUD's and municipalities. In view of the decision of the Supreme Court, the Washington cities, PUD districts are entitled to entry of judgment.

The Supreme Court has held that the Washington municipalities and districts lack the statutory authority to enter into the Participants' Agreement. That being so, the contract is ultra vires as to them and may not be enforced.

The doctrines of waiver, latches [sic] and estoppel are inapplicable in this context. Those defenses may not be raised in such a fashion as to permit enforcement of an ultra vires contract. The reasons for that are apparent. A court in finding a contract to be ultra vires is not excusing performance on behalf of the promisor in order to award the promisor in any way; in fact, courts are usually distressed if municipalities and districts do in fact exceed their authorities. What the Court is saying is that the agreement may not be enforced in order to protect the citizens of that district or that municipality. They require that type of protection; therefore if the municipal agency has exceeded its authority that contract may not be enforced. And if you think of it in that light the reasons seem to the Court to be more apparent.

The Court's decision in this regard is a limited decision. Whether there are other theories available, such as tortuous or negligent misrepresentation of authority, fraud, misrepresentation, or other issues is beyond the province of this Court. This Court's decision is based upon a ruling that the Washington municipalities and districts lacked authority, lacked statutory authority; therefore the contract is ultra vires, and an ultra vires contract may not be enforced as such. For that reason the Court will enter an order accordingly.

Chemical Bank has asked the Court to stay entry of such a judgment. The Court declines to do so. The matter has been here now for a period of a year. There has been extensive litigation. The time has come for the Court, based upon the Supreme Court's mandate to enter this order.

Likewise the Court would not have the authority to grant a trial on the issue of control. The Court can appreciate Chemical Bank's position in that regard; however, the Supreme Court again very specifically has ruled that the Participants' Agreement did not provide significant control so as to provide the equivalent of an ownership interest. The Supreme Court was specifically asked to review that aspect of their opinion in the motion for reconsideration. In fact, they were specifically asked to remand the matter to the trial court for purposes of an evidentiary hearing. They chose not to do so.

Likewise, in the motion for reconsideration, it was urged that there had been legislative ratification, that there were statutes that had not been considered by the Supreme Court. Again, by virtue of the denial of the motion for reconsideration, it is apparent that the Court rejected that motion or at a very minimum it's apparent that this Court does not have the ability to entertain a consideration of any other statutes.

Newly discovered evidence or newly discovered law normally is insufficient to permit a court to reopen a matter, and it certainly is insufficient to allow a trial court to reopen a matter after the mandate is issued.

It's apparent that this case will be before the Supreme Court again. We'll have a Chemical Bank II case, and it would be so regardless of how the Court would resolve these issues. And it may be that the Court will want to look at these issues, and there may be some modification or revision, but that is entirely beyond the scope of the trial court, left exclusively to the judgment of the Supreme Court. And obviously if the Supreme Court's final opinion in any way alters or changes any of these factors then the trial court may be involved in further proceedings but at this stage it's apparent, given the mandate and the language of what the Supreme Court has said, that judgment must be entered.

The remaining issue is whether the contract is enforceable with respect to the remaining participants, specifically, in this

context, the cooperatives. The Court is of the view that the contracts cannot be enforced as to the cooperatives and remaining participants, and for that reason judgment will be entered in their favor also.

There are three principles that need to be discussed in this regard. There is the contract interpretation question; there is the defense of mutual mistake of fact; there is also the argument relating to frustration or impracticability concerning the purposes for which the contract was entered into.

Beyond that, two additional grounds have been urged, that of public policy and unconscionability. The latter issues I will address. I do not intend in this opinion to rule on those issues definitively inasmuch as I do not believe that the Court needs to reach those issues, and there are other reasons why I'm reluctant to rule upon them. I will explain that to you when we arrive at that point.

As far as the contract is concerned, I would make the following observations: If it is read, and I have observed on numerous occasions that the contract must be read in its entirety, read in its entirety, the parties simply did not contemplate this situation. In theory, a contract of this nature may be divisible so as to have independent performances but written in the manner that it was written that is not possible in this context.

Now, I'll begin with Section 3 of the contract, the section that has language to the effect that the agreement shall become effectively only upon execution and delivery. I've viewed that from a number of perspectives. I've viewed it from the perspective of a condition that simply marks time; in other words, identifies a point in time in which performance is to begin. The court isn't able to accept that instruction in the context of this case, given the affidavits that have been filed.

I considered it from the perspective of a condition that was inserted solely for the benefit of the Supply System, in other words, a provision that indicates to the Supply System you need not begin your performance until the happening of these events, and when these events happen then you may begin your performance. Again, given the affidavits that are before the Court which have not been controverted, that is a construction that is not available to the Court.

I have not given Section 3 the construction that some have urged, and that is a construction that would indicate that the contract never came into existence. I've given it the construction that without one hundred percent participation, or at least a substantial participation, the promisor, in this instance the participants, do not have a duty to perform.

The courts will normally try to avoid a construction that indicates that an agreement never came into being. They will normally avoid that in favor of a construction that indicates that there is a condition that must be fulfilled before there is a duty to perform. That is the construction I have given the section in this instance.

I do not believe this to be inconsistent with the previous ruling of the Court. In some senses the matter that was before the Court before should have been resolved on the basis that it was premature. We had a substantially different situation at that time. There was an Oregon trial court ruling affecting approximately 8 percent of the participants. It was not at that time and there is not to this date a decision from any of the Idaho courts, other than to simply stay enforcement or payment. And insofar as Oregon is concerned at that time, and the situation is still the same today, the Oregon Supreme Court has not ruled.

The restatement takes the position in Section 229 that conditions under certain circumstances may be excused. The specific section reads: "To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, the Court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." If we were dealing with 8 percent or 5 percent or even a greater percent, the Court might well take the position that the particular condition had been excused, that a failure on the part of some small percentage to be able to perform would not constitute such a material breach of the basic purposes for which the agreement was entered into, that a court would be justified in applying the condition so as to bar performance. But we don't have that situation here. We have a minimum of 70 percent of the participants who are no longer participants by virtue of the fact that they lack the statutory authority to enter into this agreement. That being so, the Court reaches the conclusion that it does.

Now, concerning the contract itself, it is true that courts can and do, under certain circumstances, supply missing terms or revise contracts, but not to the extent that would be required here. If a court revises and, in effect, reforms a contract to accord with the intent of the parties, what the Court is basically saying is that this is what these parties intended to do or this is what these parties would have done had these conditions been known to them.

I think it's abundantly clear on this record that had the parties been aware that 70 percent of participants lacked authority, they wouldn't have entered the agreement in the first instance. The agreement wouldn't have been revised to meet this contingency. The agreement simply wouldn't have been executed.

Additionally, it's important to note that the parties could have drafted to meet this contingency had they chosen to do so, and they did not do so. One of the parties in offering oral argument has indicated that as a result of the Supreme Court decision you have very little left. The very heart of the agreement ceases to exist. There are important parts of the agreed exchange that simply didn't come about. There are difficulties now with the annual budget. The annual budget is to be prepared and proposed to a Participants' Committee.

The agreement, if read properly, indicates that there is not a Participants' Committee at this stage. There has to be a quorum of 50 percent of participants' shares. The agreement really doesn't contemplate a situation where you no longer have participants. The agreement contemplates you will have all the participants. You will have 100 percent participation. There are no provisions in the agreement for simply removing some participants and then proceeding with the remainder.

Even if you take a different view than this Court took with respect to a step-up, you have the same situation. Step-up itself was limited to 25 percent of a participant's share, and even if you utilize those provisions you still fall short. And the drafters of the agreement apparently never contemplated that this would happen; therefore they made no provisions for this situation.

Now, I adhere to the position that I took concerning step-up. That has not formally been placed before the Supreme

Court, if the Court understands the record correctly, although it is important to note that the Supreme Court on its own initiative at least suggested that it has reached a different conclusion. That is probably without the benefit of briefing or argument, but if you read the opinion, the Court indicates that another vice that they see is that the participants, without any meaningful control, could be asked to pay up to a certain point the obligations of other participants based upon a finding that those participants did not have authority. Whether that would remain their position after the matter is argued again or not remains to be seen. But regardless of how you resolve that, that wouldn't change this opinion. In other words, this Court could reason its opinion with step-up being applicable or without step-up being applicable. I would repeat again, the basic reasons for the Court's ruling in that regard is based upon the contract language that indicated that if a party failed to perform its obligations, then others could be called upon to fulfill those obligations.

The Court ruled for two reasons that the step-up is not applicable. Number one, that if one is not a participant by virtue of lack of authority, there is no obligation; and secondly, and even more importantly, all of the default provisions contemplate a remedy. It's contemplated that a participant as well as the system will always have a remedy against a defaulting participant, and remedies, at least in the contractual sense, are unavailable if you are faced with an ultra vires contract. So it was for that reason that the Court did not believe that there was a step-up. But even if you take the position that there is a step-up, it doesn't change the nature of this situation. In fact, in some senses it strengthens the position urged by participants.

Well, I've made reference to the annual budget and the fact that there is not a Participants' Committee that the annual budget can be submitted to. Therefore, whatever control or role participants had under the provisions of the agreement is not available to them at this time. Again, another important part of the bargain was involvement in the termination process if the termination process came about. That is no longer possible in view of the fact that 70 percent of the participants do not have obligations under the agreement.

There are other problems, and that is the fact that the agreement is to remain in effect till all principal and interest on the bonds has been paid. That now is an impossibility. The agreement at this state has—there is no way that it can end insofar as the remaining participants are concerned. Mr. Schumacher has identified a number of other areas that would no longer be possible under this agreement having to do with involvement in the termination process, accounting with respect to assets.

The very fact that default has occurred is a problem in this regard. The termination did not occur by virtue of anyone lacking authority. Termination occurred based upon a finding that it was not possible to continue to finance the projects. However, default is a direct consequence of 70 percent of the participants lacking authority. But for that absence of authority default would have been avoided or could have been avoided.

Now, it may have been that the restraining order would have had to have remained in effect for a longer period of time, but nevertheless default would not have been an inevitability. Default alone changes the nature of what the parties have.

The fact that Chemical Bank at this time, pursuant to the bond resolution, can seize assets, can take over management of the projects, materially alters the position that the remaining participants find themselves in. For all of these reasons it appears to the Court this contract cannot be enforced, given the Supreme Court ruling.

There are other areas that the Court will address, one of which is that there has been a mutual mistake fact that would entitle the parties to recision. Section 152 of the restatement treats the law in existence at the time of making a contract as part of a total state of facts existing at that time. That principle I think is consistent with Washington cases. It's closely related to the Washington cases that indicate that antecedent facts and antecedent duties and rights and obligations fall within the scope of this doctrine, whereas if you sign an agreement and misunderstand the nature and consequences of that act, that does not fall within the doctrine. But the Court believes that the existence or non-existence of authority at the time of entering the contract is essentially a factual matter, and that therefore this doctrine is applicable.

Insofar as mistake is concerned, it must relate to a basic assumption on which the contract was made, and in this context the mistake that was made definitely relates to a basic assumption upon which this contract was made. The basic assumption upon which this contract was made was that most, if not all, participants had authority, and certainly the assumption was that the Washington municipalities and PUD's had authority.

The party seeking avoidance must show that the mistake has a material effect upon the agreed exchange of performance. This is the closer issue in this case. The parties bargained for a meaningful role in the overall project. Not only the construction and operation project, but also the termination aspect of the project, if that came about. I've already demonstrated that by virtue of the absence of 70 percent participation, at least 70 percent participation and perhaps more, depending on how the Oregon and Idaho question is solved, there has been a material change in that regard.

The agreed exchange of performance is no longer available in the manner that the parties contemplated. The involvement of the Participants' Committee is only one example of that. The whole approach to the budget-making process, the whole approach to the termination process, is substantially different. This was an important part of the parties' bargain. The mutual mistake has rendered inapplicable many of those provisions. The only way they could be applicable now would be for the Court to perform major surgery on the agreement, and generally the courts do not perform surgery on the guise of either reformation or supplying missing terms.

The final requirement for the doctrine of mutual mistake of facts to apply is that the mistake must not be one to which the party seeking relief bears the risk. Again, as it relates to the Washington PUD's and municipalities, it would not be the Court's conclusion that the individual participants, those that remain, bore the risk. The Supply System certainly took a number of steps to minimize that risk. One step was requiring that counsel for the various entities deliver an unequivocal opinion letter. I think that stands for the proposition that the Supply System was aware of a potential risk and took steps that they believed at the time to be sufficient to isolate and in effect remove that as being the risk, but because that was their

requirement, I think that supports the conclusion that in this context they were aware of the risk.

I think it also supports the conculsion that had the parties thought about the possibility of this situation, they would have drafted the agreement substantially different. This is a situation where the Supply System, through counsel, drafted an agreement, and it would not have been difficult to have inserted provisions that would have covered a situation where you would have gone beyond the ability of the step-up to function and where you would have had a situation of this nature. That would not have been at all difficult to have drafted provisions that would have covered this situation.

Now, with respect to the doctrine of mutual mistake of fact, the restatement makes the following observations, simply paraphrased. The restatement points out that it is not enough for a party to prove that he would not have made the contract had it not been for the mistake, he must show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out.

Generally a party must establish that it is less desirable to him and more advantageous to the other parties. In exceptional cases the adversely-affected party may be able to show that the effect on the agreed exchange has been material simply on the ground that the exchange has become less desirable for him, even though there has been no effect on the other party. Such cases normally are more appropriately left to the rules on impracticability and frustration.

I think this latter is applicable here. Clearly this has not resulted in a situation that is more advantageous to the Supply System, but because of the unique nature of the undertaking, the unique nature of the agreement, I think we do have a case where the adversely-affected party is able to show and has shown that the effect on the agreed exchange has been material, simply on the ground that the exchange has become less desirable for him, even though there has been no effect on, in this instance, the Supply System.

It is important to underscore the fact that one does have to demonstrate more than a simple showing that they would not have entered the contract had it not been for the mistake. As is

always the case, in offering arguments, parties generally go several steps beyond what the law permits, and that being so, I would underscore that there is substantially more here than a showing that the parties wouldn't have entered the contract. You have to show that you wouldn't have entered the contract, and then you have to go on and show substantial reasons as to why you would not have entered the contract and basically that is to show that your burden now is materially different or you have not received the benefits of your bargain to a substantial degree. And I think that criteria is satisfied here for the reasons I have indicated, both in the contract analysis and both in the analysis that relates to mutual mistake of fact.

The rules with respect to impracticability apply. In some senses, the application is more direct than it is with mutual mistake of fact, in other senses it is not; but in any event the reasons are parallel. There are three distinct grounds for discharge of an obligor's duty. The first ground is that some circumstances has made his own performance impracticable. I've again discussed this. By virtue of the change, the lack of any type of control now, regardless of how minimal it was, it is no longer available.

The cases talk in terms of foreseeability "did the parties foresee the circumstances, and if they predicted or foresaw the circumstances, did they contract so as to make provisions for it?" Again, the parties in this case I don't believe foresaw that this was going to happen. And if they did foresee that it was going to happen, they certainly didn't take any steps to provide for its handling in the agreement itself.

I think that particular principle has been satisfied in this case. The performance now of the promisor participant, with respect to their payment obligations, has become substantially more burdensome and impracticable, given the different roles that they would be in if they were to continue to perform. They would not have the role that they would have had had the agreement proceeded as was contemplated by all of the parties.

Another independent ground is that there must be some circumstances which has so destroyed the value to him of the other parties' performance as to frustrate his own purpose in making the contract. The reasons that the Court has already identified would be applicable here.

A third independent ground is that a party will not receive the agreed exchange for his own performance because some circumstances has discharged the obligee's duty to render that agreed exchange on the ground of impracticability or frustration. This is not as applicable here, although I have already commented about the role that the Supply System will now play. The role that was contemplated for the Supply System is substantially different because the Supply System is now in default. The Supply System is in default because 70 percent of the participants were without authority to enter into the agreement.

Therefore the types of activities the participants were looking to the Supply System to perform as a part of their agreed exchange has been materially affected because of the fact that the Supply System is now in an entirely different position, they are in default; and while the agreement contemplates default, it didn't contemplate that default would occur for these reasons: It contemplated that there might be a default because of insolvency on the part of some or a willful failure to perform on the part of some. Provisions were entered to take care of this, but not to the extent that we are now faced with.

The restatement, the rationale behind the comments and the restatement are that the obligor's relieved of his duty because the contract having been made on a different basic assumption is regarded as not covering the case that has arisen. Again, I think that is clearly the situation here.

Again, in comparing the doctrine of frustration and the doctrine of mutual mistake of facts, the restatement has the following to say: *Section 266* is the notion of unexpected extreme hardship, either through impracticability of performance or frustration of purpose and the legal consequences that no duty to render performance arises. The restatement draws distinctions between situations that existed at the time the contract was entered into and situations that came about later. In the former instance, the position of the restatement is that no duty ever arose. I think we have that principle to consider in the context of this case.

The notion of allocation of risk plays a much more significant role in connection with the law of mistake than it

does in connection with the law of impracticability and frustration. And with respect to the doctrine of mistake, *Section 152* is the notion of an unexpected material imbalance in the exchange, and the legal consequence is merely one that the contract is avoidable by the party adversely affected.

It's been argued in this case that even if the Court applies the doctrine of mutual mistake of facts or frustration of purpose, or for that matter the rule relating to the nonperformance of a condition, that restitution is required. The difficulty, again, in this case is there isn't any way that a court can order restitution without ordering participants to perform the obligations under the contract. In order for there to be restitution a benefit has to have been conferred. It's very difficult in the context of this case to conclude that a benefit has been conferred. It does not appear to the court to be the type of situation where there is any meaningful or practical way to require restitution. In some cases, where there has been performance under a contract, the Court is able to and does award restitution, either to the party who is seeking to be relieved of its obligation or in appropriate cases to the other party as well. But for the reasons advanced in the briefs and in the arguments, based upon the state of the record, there isn't any way that the Court can award restitution in this instance.

Throughout the course of this case there has been, quite understandably and properly, a great deal of discussion concerning hardships, what parties are or are not innocent. The difficulty with this case is that you have substantially two bodies of people who are relatively innocent. You have ratepayers on the one hand; you have bond holders on the other hand. Certain arguments can be advanced against the innocence of both, but on the whole they are in relatively the same position.

It can be said, of course, that rate payers, through their elected representatives, had control over whether the agreement would ever have been entered into in the first instance. While that may be so in theory, there are certainly practical difficulties in that regard.

Now, insofar as bond holders are concerned, the argument has been advanced that they undertake a risk. To some extent bond holders do undertake a risk. The risk is generally one of assessing the creditworthiness of whatever institution or agency

is issuing a bond or is agreeing to make payments so the bond can be paid. But beyond that there are other risks as well, and that is the assessment of the validity of the instruments in question, be they security instruments or the validity of the issue itself.

So if you weigh and compare you have, to some extent, two groups of people that are in a similar situation, and there is simply no way that the Court in this instance is going to be able to avoid allocating risk in such a fashion that someone is not going to be substantially harmed.

Certainly the Court in October, when it ruled, was cognizant of the effect that this would have on the ratepayers. The Court is cognizant of the effect that this will have on bond holders, but the Court throughout these proceedings, to the extent possible, has tried to view the principles of law without taking into consideration matters of hardship, unless those were proper factors for the Court to weigh.

I have reviewed this case and decided this case, based upon the facts, the affidavits, the facts that have not been rebutted or controverted in any way, and the principles of law as I believe them to be. The Supreme Court will certainly have an opportunity to review this case and reach whatever conclusions it believes to be appropriate.

I am not addressing questions of public policy and unconscionability, even though I asked questions of some of you while that was being argued. It's very difficult for the Court to believe, as it reads the Supreme Court opinion, that the Supreme Court would draw a distinction between a Washington municipality and PUD's and remaining cooperative participants. I make that statement based not only on what the Supreme Court has said, but also in the manner in which they have said it.

Now, I have reviewed this with respect to various legal principles and believe that these principles control the result here. I acknowledge that the Supreme Court, in reviewing the matter, may well undertake an evaluation of public policy considerations. I have not done so for several reasons.

The language in the Supreme Court opinion that makes reference to public policy is in the context of discussing the

statutes that regulate the authority of municipalities and districts, and the language with respect to public policy is in the context of explaining why these statutes are important to those entities. There also is some ambiguity, at least in the record, with respect to whether or not a member of a cooperative would have any meaningful choice. A ratepayer in the City of Seattle and City of Tacoma or Snohomish County essentially has no meaningful choice. They can curtail their use of electricity, they can have their electricity disconnected, but they don't have any other suppliers available to them.

With respect to the cooperatives, the papers before the Court suggest two things. Some of the affidavits suggest that this is precisely the situation that a ratepayer of a cooperative is in, and if that be the case, then there may well be defensible public policy grounds to extend the Supreme Court rulings to cooperatives as well to the gound of public policy.

On the other hand, there are papers before the Court that indicate that some cooperatives are concerned that if the enormous debt, if their share of the enormous debt is to be borne by them that they will lose members to competing suppliers. There is also, if I recall correctly, and there are volumes and volumes of affidavits to be kept in mind, if I recall correctly, I believe that there are papers filed on behalf of some of the Idaho cooperatives indicating there is a means in Idaho where a petitioner may petition a court or body and they may receive electricity from other sources. I think the record is ambiguous in that regard and I'm reluctant to address public policy consideration for that reason.

I'm also reluctant because I believe the Supreme Court discussion was intended to relate only to the principle of law that municipal corporations are subject to control by the legislature, and may exercise only those powers that are expressly granted to them or those powers that are necessarily implied based upon their express grant for power.

Again, the conclusions as to whether there was or was not authority is indeed debatable, but it has been decided and further discussion in that regard is foreclosed. As far as unconscionability is concerned, if you recall in October when the Court ruled, I believe I indicated that I did not believe the agreements were substantively unconscionable for the reason

that such agreements have been sanctioned in other jurisdictions. In reading the Supreme Court opinion I would conclude that if the legislature were to pass a statute or had passed a statute specifically authorizing clauses of this nature, that there would not have—that the authority ruling would not have been as it was, even given all of the other terms that are in the contract. So I am reluctant t reach the issue of whether the agreement is unconscionable. Normally unconscionable agreements are such that they are so one-sided and so harsh that they cannot be enforced, and I think what the Court is saying here is that these agreements are ultra vires, not on that basis but on the basis that there was no authority for them in the first instance, and so I would be reluctant to deal with the question of unconscionability for that reason.

There are additional reasons as well. You always have to look at an agreement, and if the agreement seems to be one-sided or contains harsh terms, you have to look at the context of the agreement. What may be unconscionable in one context is not unconscionable in another, and again it must be borne in mind that this was a gigantic undertaking that was going to involve, at the beginning, every estimate was it was going to involve several billion dollars, and therefore it's not at all peculiar that agreement would be drafted so as to provide an unconditionable obligation to pay, to limit remedies to ensure that there would always be a stream of funds sufficient to make the payments, and it is not at all unusual that the other provisions of the agreement would be inserted when you are facing this kind of a situation. So for those reasons I don't reach those issues, although I think they are debatable, particularly the issues that relate to public policy. That covers the basic reasons that the Court has employed in arriving at this conclusion.

The Court has form orders before it. The parties need to discuss that, and there are some revisions that need to be made in view of the Court's ruling. Additionally the Court has indicated what it intends the scope of this ruling to be, and that is based upon a decision that Washington municipalities and public utilities districts lack statutory authority, the agreement as to them is ultra vires and the agreement may not be enforced. The Court does not intend to go beyond that.

If there are issues pending in other courts that relate to other theories of recovery, aside from the contractual theory the Court has dealt with here, then that is within the province of those courts to decide, not within the province of this Court.

We will be at recess. If you wish to review form orders, and if you feel that those can be settled this morning, we can address that issue. If you feel that they cannot be settled we can set a date in the very near future for that to occur so that these orders may become final and you may begin the appeal process.

We'll be at recess.

(Court Adjourned.)

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CHEMICAL BANK, a New York corporation,

Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,

Defendants.

No. 82-2-06840-3

Order on Motions for Summary Judgment

Plaintiff Chemical Bank ("Chemical") filed a motion for summary judgment on July 21, 1982. Various defendants moved to strike Chemical's motion or to continue the hearing on the motion. Following hearings on said motions to strike or continue Chemical's motion for summary judgment, on September 7, 1982, the court ordered that (1) the defendants' answering papers were due by September 20, 1982, (2) Chemical's reply papers were due by October 6, 1982, and (3) Chemical's motion would be heard on October 11, 1982.

On September 20, 1982, defendant Washington Public Power Supply System ("WPPSS") formally joined in Chemical's motion for summary judgment. On or about the same date, defendant City of Ellensburg ("Ellensburg"), defendants City of Springfield ("Springfield") and City of McMinnville ("McMinnville"), the so-called "Columbia defendants" and the so-called "22 defendants" filed crossmotions for summary judgment or partial summary judgment, and these and other defendants filed various memoranda and other papers in opposition to Chemical's motion. In addition, defendant City of Richland ("Richland") filed a motion for summary judgment on September 29, 1982, and defendant Vera Irrigation

District No. 15 ("Vera") filed a motion for summary judgment on or about October 6, 1982.

On October 6, 1982, Chemical and WPPSS each filed a reply memorandum in support of Chemical's motion for summary judgment and in opposition to the various defendants' crossmotions for summary judgment or partial summary judgment. In addition, WPPSS filed eleven affidavits in support of Chemical's motion and in opposition to the various other defendants' crossmotions.

Oral argument on the aforesaid motions and crossmotions was heard before the undersigned judge of this court on October 11, 12 and 13, 1982. All parties and their counsel were given an opportunity to present their arguments, and the court heard and has duly considered all arguments presented at the hearing. In addition, the court has read and has duly considered the pleadings, papers and materials filed in this action which are listed in the Appendix to Order on Motions for Summary Judgment, which Appendix is filed herewith and is by this reference incorporated herein.

The court announced its oral decision on the aforesaid motions and crossmotions on October 15, 1982. Proposed forms of an order were presented to the court at a hearing on November 8, 1982. For the reasons set forth in the court's October 15, 1982, oral decision, which by this reference is incorporated herein, and for the additional reasons announced by the court at the November 8, 1982, hearing on the proposed forms of order, IT IS HEREBY ORDERED as follows:

1. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of the debt service which WPPSS is obligated to pay on the bonds issued pursuant to WPPSS Board of Directors Resolution No. 890 (the "Bond Resolution") and the resolutions supplemental thereto. Such debt service on the bonds includes all principal and interest when due, whether or not any of the projects (WPPSS Nuclear Plants Nos. 4 and 5) has been or ever will be completed or placed into operation.

2. As a matter of law, the language of the Participants' Agreement provides that the participants are obligated to pay WPPSS their respective shares of decommissioning costs incurred by WPPSS, whether or not any of the projects has been or ever will be completed or placed into operation. Under the terms of the Participants' Agreement, such decommissioning costs (a) are not limited to costs incurred after termination of the projects and (b) are to be included in the Annual Budgets or amended Annual Budgets and are to be paid by the participants pursuant to the annual or amended Billing Statements.

3. As a matter of law, WPPSS had statutory authority to enter into the Participants' Agreement and Bond Resolution and to issue the bonds pursuant thereto.

4. As a matter of law, the Washington participants (other than Vera) had statutory authority to enter into the Participants' Agreement. All Oregon authority issues have been stayed pursuant to an earlier order of this court, and this order has no bearing on the authority of Oregon participants to enter into the Participants' Agreement. The court reserves decision as to whether Vera and the other participants had authority to enter into the Participants' Agreement and will give further consideration to that issue at a later date.

5. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the incurring of debt. Such obligations do not constitute debt within the meaning of such limitations, and even if such limitations were otherwise applicable, they would be rendered inapplicable by reason of the special fund doctrine under Washington law.

6. As a matter of law, any obligations of the Washington participants under the Participants' Agreement do not violate Washington constitutional or statutory limitations on the lending of credit.

7. As a matter of law, the Participants' Agreement does not constitute or provide for any unlawful delegations of power or authority by Washington participants.

8. The Interstate Compact Clause of the United States Constitution is not applicable to the Participants' Agreement.

9. In order to give the defendant participants additional time to respond to the affidavits filed by WPPSS on October 6, 1982, the participants have been given until November 12, 1982, in which to file any affidavits or other materials in response to said affidavits filed by WPPSS. The court will hear further oral argument on December 13, 1982, or on such other date as may be fixed by the court, to determine what other issues, if any, can be decided by the court as a matter of law and what fact issues, if any, remain for trial.

10. The aforesaid crossmotions for summary judgment or partial summary judgment filed by Ellensburg, Springfield and McMinnville, the "Columbia defendants" and the "22 defendants" are denied.

11. Although this is an interlocutory order, the court recognizes that this case involves fundamental and urgent issues of broad public import which require prompt and ultimate determination. Accordingly, the court invites any of the parties to seek immediate discretionary review by the Court of Appeals or the Supreme Court of any portion or portions of this order.

DONE IN OPEN COURT this 16 day of November, 1982.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN,
MARTIN, TODD & HOKANSON

By /s/ DAVID F. JURCA
David F. Jurca

By /s/ LINDA J. COCHRAN
Linda J. Cochran

Attorneys for Columbia Defendants

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHEMICAL BANK, a New York corporation
Plaintiff,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency; et al.,
Defendants.

No. 82-2-06840-3

Appendix to Order on Motions for Summary Judgment

The court has considered the following pleadings, papers and materials in reaching its Order on Motions for Summary Judgment of even date herewith:

	Name of Document	Filing Date	Clerk's Submittal No.
1.	Complaint for Declaratory Relief	5/18/82	1
2.	Chemical Bank's Motion for Summary Judgment	7/21/82	131
3.	Affidavit of Harlan R. Kosmata in Support of Plaintiff's Motion for Summary Judgment	7/21/82	128
4.	Memorandum in Support of Plaintiff's Motion for Summary Judgment	7/21/82	129
5.	Memorandum in Support of Defendant City of Ellensburg's Motion to Strike Plaintiffs' Summary Judgment Motion	8/3/82	175
6.	Motion of Cities of Springfield and McMinnville to Continue Plaintiff's Pending Motion for Summary Judgment	8/3/82	181
7.	Motion for Continuance of Plaintiff's Motion for Summary Judgment	8/2/82	166
8.	Motion and Notice of Hearing of Motion to Strike Plaintiff's Pending Motion for Summary Judgment with attached Affidavit of Margaret A. Pageler	8/2/82	172

Name of Document	Filing Date	Clerk's Submittal No.
9. Notice of and Motion for Continuance	8/3/82	178
10. Affidavit of David F. Jurca in Support of Motion for Continuance	8/3/82	174
11. Memorandum in Support of Motion for Continuance	8/3/82	173
12. Certain Defendants' Answer, Counterclaim and Crossclaims.	8/6/82	1955
13. Memorandum of Oregon PUD's in Support of Motions to Strike Chemical Bank's Pending Motion for Summary Judgment	8/4/82	184
14. Memorandum of City of Milton-Freewater, Salmon River Electric Cooperative, Inc. and Missoula Electric Cooperative, Inc. Re Scheduling of Chemical Bank Motion	8/6/82	205
15. Motion for Reconsideration by 22 Defendants	8/16/82	246
16. Affidavit of Gordon W. Wilcox in Support of Motion for Consideration	8/16/82	245
17. Columbia Defandants' Memorandum Regarding Summary Judgment Briefing Schedule	8/26/82	327.6
18. Memorandum of Washington Public Power Supply System re Scheduling of Chemical Bank Motion and Trial (Hearing date: August 9, 1982)	8/5/82	193
19. Memorandum in Opposition to Motions to Continue or "Strike" Chemical's Summary Judgment Motion	8/5/82	188
20. Motion for Summary Judgment and Motion for Reconsideration by 22 Defendants	9/7/82	401
21. Order Setting Schedule for Briefs Regarding Chemical Bank's Motion for Summary Judgment	9/7/82	399

Name of Document	Filing Date	Clerk's Submittal No.
22. Further Affidavit of John D. Lowery on Behalf of 22 Defendants in Support of (1) Motion for Reconsideration of Dates for Summary Judgment and Trial in Light of New Evidence Discovered in Bond Counsel's Files and (2) Motion to Compel Production of Privileged Documents	9/13/82	419
23. Defendants Ellensburg Ratepayers' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment	9/17/82	451
24. Joinder in Motion for Reconsideration by 22 Defendants-Missoula Electric Cooperative, City of Milton-Freewater and Lincoln Electric Cooperative	9/17/82	4454
25. Memorandum of Washington Public Power Supply System in Opposition to Motions for (1) Reconsideration of Rulings re Summary Judgment Hearing and Trial Dates and (2) Summary Judgment	9/18/82	442
26. Response to Motion for Summary Judgment and for Reconsideration for Twenty-Two Defendants	9/17/82	448
27. Motion of Washington Public Power Supply System for Summary Judgment	9/20/82	460
28. Cross Motion for Summary Judgment of City of Springfield and City of McMinnville	9/20/82	455
29. Memorandum in Support of Cross Motion for Summary Judgment of City of Springfield and City of McMinnville with attached Exhibits	9/20/82	454
30. Response to Plaintiff's Motion for Summary Judgment on Behalf of 22 Defendants (See attached Exhibit A)	9/21/82	474

Name of Document	Filing Date	Clerk's Submittal No.
31. Affidavit of John D. Lowery on Behalf of 22 Defendants (See Attached Exhibit A) Pursuant to C.R. 56(f) in Opposition to Plaintiff's Motion for Summary Judgment	9/21/82	468
32. Motion for Summary Judgment of 22 Defendants (See Attached Exhibit A) Regarding Authority of Washington Municipalities and PUDs to Enter Into Participants' Agreement	9/21/82	469
33. Memorandum in Support of Motion for Summary Judgment Regarding Authority of Washington Municipalities & PUDs to Enter Into Participants' Agreement	9/21/82	469
34. Intervenors-Defendants Clark County PUD Owners Association, et al. and Fair Use of Snohomish Energy et al's Memorandum in Opposition to Chemical Bank's Motion for Summary Judgment	9/20/82	467.8
35. Affidavit of Boyd A. Parker, General Manager of Lower Valley Power and Light, Inc., in Opposition to Plaintiff's Motion for Summary Judgment	9/14/82	427
36. Memorandum of the Oregon Cities of Canby, Cascade Locks and Drain in Opposition to Motion for Summary Judgment	9/20/82	467.7
37. Columbia Defendants' Motion for Partial Summary Judgment	9/20/82	467.10
38. Columbia Defendants' Memorandum in Opposition to Chemical's Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	(corrected copy) 9/27/82	503

Name of Document	Filing Date	Clerk's Submittal No.
39. Affidavit of Herschel F. Jones in Opposition to Chemical's Motion	9/20/82	467.4
40. Affidavit of Lew R. Greene in Opposition to Chemical's option for Summary Judgment	9/20/82	467.3
41. Affidavit of Linda J. Cochran in Opposition to Chemical's Motion for Summary Judgment	9/20/82	467.5
42. Affidavit of David F. Jurca in Opposition to Chemical's Motion for Summary Judgment and in Support of Columbia Defendants' Crossmotion for Summary Judgment	9/20/82	457
43. Oregon PUDs' Memorandum in Opposition to Chemical Bank's Motion for Summary Judgment and in Support of Columbia Coop's Motion for Summary Judgment	9/21/82	482
44. Memorandum and Response of Washington Public Utilities Group to Plaintiff's Motion for Summary Judgment	9/20/82	467.9
45. Memorandum of City of Milton-Freewater, Salmon River Electric, Missoula Electric, Vera Irrigation, Lincoln Electric and Big Bend Electric in Response to Chemical Bank's Motion for Summary Judgment	9/20/82	458
46. Defendant City of Ellensburg's Motion for Summary Judgment	9/20/82	472
47. Memorandum of Defendant City of Ellensburg in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Motion for Summary Judgment	9/20/82	461
48. Affidavit of Robert Walker in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	9/20/82	463

Name of Document	Filing Date	Clerk's Submittal No.
49. Affidavit of Margaret A. Pageler in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	9/20/82	462
50. Correction of Typographical Errors in Columbia Defendants' Memorandum in Opposition to Chemical's Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	9/27/82	502
51. Chemical's Reply Memorandum in Support of Its Motion for Summary Judgment	10/6/82	537
52. Memorandum of Washington Public Power Supply System in Support of Plaintiff Chemical Bank's Motion for Summary Judgment, and in Opposition to the Motions for Summary Judgment of Certain Defendants	10/6/82	536
53. Defendant Ellensburg Ratepayers Cross Motion for Summary Judgment	9/29/82	512
54. Affidavit of Scott L. Schmidtman in Support of Ellensburg Ratepayers' Cross Motion for Summary Judgment	9/29/82	513
55. Defendant City of Richland's Motion for Summary Judgment	9/29/82	508
56. Memorandum of Defendant City of Richland, Washington, in Opposition to Certain Motions for Summary Judgment and in Support of its Motion for Summary Judgment	9/29/82	506
57. Columbia Defendants' Joinder in Other Defendants Opposition to Chemical Bank's Motion for Summary Judgment and in Others' Crossmotions for Summary Judgment	10/7/82	562
58. Motion of Defendant Vera Irrigation District No. 15 for Summary Judgment	10/7/82	547

Name of Document	Filing Date	Clerk's Submittal No.
59. Supplemental Memorandum of Defendant Vera Irrigation District in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Motion for Summary Judgment.....	10/7/82	548
60. Correction of Typographical Errors in Chemical's Reply Memorandum	10/8/82	5665
61. Second Memorandum and Response of Washington Public Utilities Group to Plaintiff's Motion for Summary Judgment.....	10/7/82	542
62. Defendant Ellensburg Ratepayers' Memorandum in Rebuttal of WPPSS's Responsive Memorandum in Support of Summary Judgment.....	10/8/82	566.4
63. Reply Memorandum of Springfield and McMinnville in Support of Motion for Summary Judgment.....	10/8/82	578
64. Second Affidavit of Robert Walker in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant City of Ellensburg's Similar Motion	10/8/82	570
65. Response of 22 Defendants (See Attached Exhibit A) to Plaintiff's, WPPSS's and Richland's Memoranda re Summary Judgment.....	10/11/82	582
66. Motion to Strike Affidavit of Richard C. Yarmuth	10/11/82	579
67. Memorandum of Columbia Defendants in Support of Motion to Strike Affidavit of Richard C. Yarmuth	10/11/82	578
68. Columbia Defendants' Preliminary Response to Reply Memoranda of Chemical Bank and WPPSS	10/11/82	574.3

Name of Document	Filing Date	Clerk's Submittal No.
69. Affidavit of Linda J. Cochran in Opposition to Chemical and WPPSS' Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	10/11/82	574.1
70. Supplemental Affidavit of David F. Jurca in Opposition to Chemical and WPPSS' Motion for Summary Judgment and in Support of Crossmotion for Partial Summary Judgment	10/11/82	574.2
71. Affidavit of Thomas W. Burt in Opposition to Chemical's Motion for Summary Judgment Regarding Failure of Condition Precedent of Enforceability of Participants' Agreement.	10/11/82	581
72. Additional Affidavit of John D. Lowery on Behalf of 22 Defendants Pursuant to CR 56(f) in Opposition to Plaintiff's Motion for Summary Judgment	10/11/82	583
73. Joinder of 22 Defendants in Other Defendants' Opposition to Chemical Bank's Motion for Summary Judgment and in other Defendants' Crossmotions for Summary Judgment	10/11/82	584.5
74. Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	588
75. Affidavit of John D. Lowery in Support of Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	587
76. Memorandum in Support of Motion of 22 Defendants to Strike Affidavits Submitted by WPPSS in Support of Plaintiff's Motion for Summary Judgment	10/11/82	586

In addition, the court read but did not consider the following affidavits in reaching its Order on Motions for Summary Judgment of even date herewith:

Name of Document	Filing Date	Clerk's Submittal No.
77. Affidavit of Richard C. Yarmuth in Support of Chemical's Motion for Summary Judgment.....	10/6/82	535
78. Affidavit of Gedale B. Horowitz in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
79. Affidavit of George P. Jenkins in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
80. Affidavit of Harlan R. Kosmata in Support of Chemical's Motion for Summary Judgment.....	10/8/82	568
81. Affidavit of Harlan R. Kosmata Regarding Termination	10/8/82	567
82. Affidavit of Donald W. Mazur in Support of Chemical's Motion for Summary Judgment	10/8/82	569
83. Affidavit of Bert L. Metzger, Jr., in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
84. Affidavit of Morgan J. Murray in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
85. Affidavit of Norman E. Nichols in Support of Chemical's Motion for Part of Summary Judgment.....	10/6/82	Sub #536
86. Affidavit of Francis J. Quinn in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536
87. Affidavit of Norman A. Stoll in Support of Chemical's Motion for Part of Summary Judgment	10/6/82	Sub #536

DONE IN OPEN COURT this 16th day of November, 1982.

/s/ H. JOSEPH COLEMAN

H. Joseph Coleman
Judge of the Superior Court

Presented by:

HELSELL, FETTERMAN, MARTIN,
TODD & HOKANSON

By /s/ DAVID F. JURCA

David F. Jurca

By /s/ LINDA J. COCHRAN

Linda J. Cochran

Attorneys for Columbia Defendants

IN THE

Superior Court

OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CHEMICAL BANK,

Plaintiff,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Defendants.

No. 82-2-006840-3

COURT'S ORAL DECISION

BEFORE JUDGE H. JOSEPH COLEMAN

October 15, 1982

1:30 p.m.

E713 King County Courthouse

Seattle, Washington

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THE COURT: Good afternoon. Please be seated.

This is a complex case rendered more complex by the fact that we are today reviewing actions taken by public bodies in 1976, with the full knowledge that a disaster has occurred. This fact, however, does not alter the proper application of the various legal rules.

Both sides have offered strong equity arguments with respect to the issues that are before the Court; consequences are obviously enormous. A ruling either way may have substantial adverse effects on the public.

It is not appropriate, however, for the Court to weigh these considerations or to determine what is a popular result but, rather, it is the function of the Court to determine to the best of its ability what the applicable rules of law are.

The ruling will go into some detail with respect to analysis. I will therefore summarize it so that you will know what the Court's ruling is.

The Court will rule that the contract as a matter of law imposes debt service and decommissioning costs on participants, and the Court will also rule that the participants had legal authority to enter into the agreements, with the possible exception of the Vera Irrigation District and participants of other states; the Court, with respect to those matters, has deferred ruling and will consider those issues at a later date.

Before beginning the analysis, several observations are necessary. There are unusual features to the case; it's unusual in one sense in that all participants are not taking the same position. For example, the City of Richland has taken the position that under the contract they are fully responsible and are prepared to proceed. A significant number of the public utility districts, as Mr. Malanca pointed out in the arguments, has not yet determined what position to take.

There are certain undisputed features. I will review these in the context that they have a bearing on contract interpretation questions. The Court is aware that there remain issues that are not to be determined today with respect to contract formation and validity defenses. So these observations are to be construed only in the context of the issues that the Court is deciding today.

It is undisputed that all participants were of the view that entering into this agreement was in their best interest due to the projection of significant power shortages in the Pacific Northwest. The acts taken at that time were for the public purpose of having a block of energy available to them in the future at reasonable costs so as to provide their respective energy needs. It was a form of expanding their capacity to supply electric energy to their respective communities.

Now, again, only in the context of contract interpretation and for the purposes of determining whether we have an agreement that represents the entire understanding of the parties, it is important to make these observations, and, again, this is undisputed. And for these purposes I am relying solely upon affidavits filed by the various participants and drawing all inferences from those affidavits that can reasonably be drawn in their favor.

Each participant received the proposed Participants' Agreement and form of Bond Resoultion and had a period of 90 days to review the document and accept it or reject it. Those affidavits would establish that any significant alterations or, for that matter, no alterations at all would be permitted. Those affidavits also indicate that these agreements were reviewed by counsel for each of the participants. And, again, these documents would indicate that counsel were advised that they would have to respond in the form offered; but, once again, it is important to note that the documents were reviewed by counsel, and counsel for the participants made a decision that the contents of the opinion letter were accurate, and therefore they were signed.

When we get to the question of contract interpretation, there are two issues that need to be determined first.

There are two rules, the plain meaning rule and the intent test. As the Washington Court has observed on a number of occasions, the purpose of the rule is the same, and that is to determine whether the instrument in question represents the entire understanding of the parties. If it represents the entire understanding by the parties, then the contract supersedes tentative terms discussed in earlier negotiations; and, consequently, in determining the content of a contract, the earlier tentative agreement and negotiations become irrelevant.

There is no issue here in terms of the instrument representing the entire understanding of the parties. The issues here is what the instrument means.

The whole question of extrinsic and parol evidence becomes difficult because of the confusion that often occurs in deciding the purpose for which it is being offered.

Now, with respect to interpretation, the Court's first function is to determine whether there is an ambiguity. If there is not an ambiguity, then construction becomes a question for the Court. If there is ambiguity, extrinsic evidence may be received.

The contract construction question involves issues that are normally not involved in cases in the sense that the Court is required at an appropriate time to determine whether extrinsic evidence is even admissible. If extrinsic evidence isn't even admissible, then there is nothing for the Court to consider.

There are different approaches to the interpretation question, but the Washington cases, in the Court's view, have followed the approach suggested by Williston; the Grant County v. Lane Construction case I think stands for that propostion. I will quote: "If there was such an ambiguity that the Court could not reasonably ascertain the parties' intention from the language employed, then parol evidence to explain the ambiguity is admissible. If, however, there was no such ambiguity as in law would warrant the admission of extrinsic evidence to enable the Court to determine what the parties intended, the contract must be construed according to its terms." It is important to note the language that the Court uses, "If, however, there was no such ambiguity as in law would warrant the admission of extrinsic evidence to enable the Court to determine what the parties intended, the contract must be construed according to its terms."

The Court goes on to say that, "The intentions of the parties should be ascertained from the entire writings and if at all possible, all parts of the writing are to be construed so as to harmonize with one another."

Now, it is for this reason that I indicated some of the undisputed facts are important in the context of interpretation. It is important to determine if we are dealing with an in-

strument that purports to be the entire agreement of the parties. It is also important to determine that the parties had an opportunity to review and read that instrument prior to the time they decided to enter into it.

With respect to ambiguity, the Washington cases shed some light as to what is meant by ambiguity. For example, in the Weyerhaeuser case which has been cited by the parties, the question there was not whether the agreement was not an entire understanding of the parties; the question there was whether the intent of the parties could be determined from the agreement itself, it being recognized that the agreement was the entire understanding.

The significant language in that case was "all minerals of any nature whatsoever, including coal, iron," et cetera. A reading of that entire agreement did not enable one to know what the parties meant by the term "minerals of any kind whatsoever." The Court went into detail as to why that was an ambiguity.

There are other cases that demonstrate this same proposition. For example, in The Sons of Norway v. The Boomer case, which is also referred to in these opinions, the question was whether pool tables fell within the terminology of "machines and other devices for public entertainment." A review of the entire agreement did not enable one to determine what the parties intended.

Likewise, in the Forester v. Craddock case, the ambiguity was between two sections of the contract, one section indicating that there was a maximum amount with respect to the construction contract, another section indicating that the method of payment was a cost-plus method.

Once again the Court emphasized that the contract as a whole was not free of ambiguity. In other words, it could not be read in such a fashion so as to remove the ambiguities.

The fact that a document is inartfully drafted or that it may have conflicting provisions or that it may be read so as to seem conflicting does in and of itself not raise an ambiguity for purposes of contract construction. If the instrument as a whole supplies the meaning, then the intent is determined based upon the writing and there is not resort to extrinsic evidence.

It is important to observe, also, that even if extrinsic evidence is received to determine intent, we are only interested in manifestations of bilateral intent; objectively manifested actions must be to the exclusion of oral statements unless such oral statements clearly show themselves to be bilateral ones. Again, there are a number of cases that demonstrate this proposition. Eagle Insurance v. Allbright is one of the specific cases that does that.

Now, the Court is of the view that this conclusion is supported on either prong of a two-prong analysis. In a few moments the Court will go through the analysis that it has exercised in order to reach this conclusion. But the contract itself, without even considering extrinsic evidence, leads to this conclusion, given the rule that one must first look to the rule and determine if it can be construed standing alone. And as has already been indicated, if it cannot be construed standing alone, then extrinsic evidence may be received.

But even assuming for the moment that extrinsic evidence is properly to be considered, the state of the record suggests this—and, again, I am relying only on affidavits and documents presented by participants. As I indicated—and this will become important with respect to some of the formation defenses—as I indicated, the briefing schedules were such that affidavits filed by the Supply System in support of the motion for summary judgment, which purported to cover all issues, did not provide sufficient time to reply to some of those affidavits. It was for that reason that the Court indicated that that portion of this motion that relates to validity defenses would have to be deferred and considered at a later time.

In any event, taking the undisputed evidence that is before the Court, the only thing that is offered on behalf of participants are indications of subjective feelings or subjective conclusions or subjective intent.

The complaint has been raised that there has been inadequate time for discovery. Without commenting on that one way or the other, it is important to observe that counsel for participants have unique access to their own clients, and there has been sufficient time for there to be the production of any evidence that would indicate bilateral manifestations of objective to the intent, and the record is simply void of any fact affidavits along those lines.

Now, with respect to the contract itself, the contract contemplated a number of eventualities. The key to understanding this contract is to review it and understand from its language that it was drafted so as to cover these various eventualities. There was not one project in progress, there were two projects in progress; and the contract was covering both projects.

The eventualities the contract covered are as follows: Precompletion termination for one or both plants. And Section 13 of the Participants' Agreement and Section 6.2(a)3 and Section 6.9(j) of the Bond Resolution are sections that are indicative of this.

It also contemplated post-completion termination of one or both plants. And it also contemplated completion of one or both plants.

It was also contemplated that bonds would be sold and the proceeds would be used to finance construction; and that, subject to the terms of the agreement, participants therefore would not pay for construction costs for the reason that construction costs would be paid from the proceeds of bond sales.

It is also axiomatic that there would be a market for revenue bonds only so long as a project was under construction.

It is also clear that the Supply System bound itself to make the necessary transfers from the revenue fund to the bond fund to pay all principal and interest on the bonds when due.

Furthermore, it is also clear that, with the exception of bond proceeds,the only source of available funds to the Supply System were the payments to be made under the agreement entered into with the participants.

The bonds were special revenue bonds, and this was the only source of payments.

The parties provided in the Participants' Agreement and the Bond Resolution, which was made a part of the Participants' Agreement and must be construed in conjunction with it, also provides that the agreement would remain in effect until payment of all principal and interest on the bonds have been provided for.

A prospective bond purchaser upon review of the documents would be apprised that the security for the security for the bonds if the projects were not completed would be the pledge of revenue by the participants of their utility properties for payments required under the Participants' Agreement; and if completed, the security for payments would be the unconditional payments required under the agreement. And I will be discussing Section 6(d) in a moment, but Section 6(d) requires some special construction. In any event, that is what a prospective purchaser would realize from reading the documents; in other words, that there was a source of funds not predicated upon revenue being produced from the project itself and that there was a security for the bonds separate and apart from completion.

The further fact that the agreement embraced the possibility of pre-completion termination for both projects makes it clear that the security for repayment of the bonds, including interest, was not limited solely to revenues received from an operating project.

With this background, we can turn to the key issue, and that is what was meant by the language "payments to be made by participants under the agreement."

One has to examine why construction costs were eliminated from the annual budget. A careful examination of the agreement leads to only one conclusion, and that is they were eliminated to ensure that participants would not pay for costs which had already been funded or for which funding provisions were available. This answers the question as to why under the annual budget they were excluded. They were not excluded to ensure that participants would not have a dry-hole risk.

Let me go through this. Under 6.9(f) of the Bond Resolution, interest accruing to July 1, 1988, which is not payable pursuant to Section 6.2(a)1 would be a cost of construction. In other words, interest accruing to July 1, 1988, which is not covered by revenue from a completed plant, is a cost of construction. Under 6.2(a)2, after July 1, 1988, interest accruing on the bonds to be paid from the revenue fund into the bond fund interest account; notice that you still may not have completed projects and, therefore, no revenue, if you accept the construction that participants have placed upon the term "rev-

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enue." In that connection it is important to note other sections of the agreement that talk in terms of the Supply System's obligation and the fact that the revenue fund would receive all receipts, profits, moneys, et cetera.

If there was a termination prior to July 1, 1987, the provisions of 6.2(a)3 are applicable. The payments are to be made, one, when a project is terminated before July 1, 1987, since it takes one year after termination before the annual budget goes into effect, so there is a need only to cover the event of termination up until July 1, 1987, as post-July 1, 1988, costs are already covered; and, two, for an amount of interest accruing on the bonds, which constitutes a cost determination less revenue from completed plants, 6.2(a)1, and less amounts deposited with the bond fund trustee from sales of bonds, 6.8(a)2, all payments to be made from the revenue fund.

Now, to summarize this, before July 1, 1988, these are the sources of payment for interest on the bonds: one, sale of bonds, under 6.8(a)2; two, revenue from completed plants, under 6.2(a)1; and, three, money from the revenue fund less moneys collected from the sale of bonds and money collected from revenue from completed plants, under 6.2(a)3. So if you take each of those sources—source one, source two and source three—you have 100 percent.

After July 1, 1988, it comes from the revenue fund entirely, and that equals 100 percent, notwithstanding the contemplated possibility of incompleted projects at that time.

In a situation where both projects are terminated, debt service is a cost of termination, there having been an appropriate credit for any cost of termination paid from the construction fund. Again, I refer you to the sections that the Court has discussed.

Interest on the bonds for plants which have been terminated is to be paid as a cost of construction to the extent that construction funds are available, pursuant to Bond Resolution 6.2(a)3, which provides for monthly payments of interest on bonds for terminated plants; Section 13(a)3, which provides that a final accounting statement is to be rendered indicating the amount of payment to be made by participants for termination, does not control the timing of debt service payments

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following termination. Rather, its essential purpose is to provide that the participants are given proper credits for the fair market value of any assets relating to the terminated plants.

Now, again to review briefly, the instrument as a whole makes it unmistakably clear that: All interest and principal on the bonds is to be paid and the System undertakes this unconditional obligation; the agreement is to remain in effect until the obligation is discharged; the sole source of income to the System comes from participants; the only other funding source is from the sale of bonds.

Section 6(d), which refers to payments required to be made under the agreement, is important in interpreting the total context of the agreement, because it uses the language "whether any of the projects are completed, operable or operating," again indicating that there is to be an annual budget and money is due from participants notwithstanding the fact that there may not be any operating plants.

Section 1 of the agreement makes it clear that debt service is an item that is to be included in the annual budget. And the Court has already discussed at length its views as to what the contract says concerning the exclusion of construction costs.

Now, as the Court has indicated, the fact that an instrument must be read carefully and in its entirety or the fact that it has inartful phraseology does not in and of itself raise an ambiguity.

The next question is the authority question. The first issue raised in that regard is the authority of the Supply System itself to issue the revenue bonds. The answer to that question is in the affirmative, the Supply System did have the authority to issue revenue bonds. Again, one must go back to the date of issue and examine it at that time.

The bonds were issued with the sole source of revenue for payment limited to moneys received as a result of the operation of the project for which the bonds were issued. That statute cannot be read so as to require that there be existing utilities in operation. Again, if the pledge of revenues is solely limited to moneys that would be received in conjunction with the operation, the bonds have been properly issued.

Separate and distinct from this question is whether cities and districts had the authority to enter into this agreement. There are several statutes and some cases that have led the Court to the conclusion that they did. In most respects the Court found the authority question to be the most difficult in this area.

Beginning with Chapter 43, there are several statutes the Court wishes to read. I am not going to review all of the statutes that were cited—the citation of these statutes are in the record—but there are some statutes that the Court thinks are critical in this regard, the first being 43.52.300.

43.52.300 relates to the powers and duties of an operating agency. Subdivision 3 provides "To negotiate an enter into contracts with the United States or any of its agencies, with any state or its agencies with Canada or its agencies, or with any district or city of this state, for the lease, purchase, construction, extension, betterment, acquisition, operation and maintenance of all or any part of any electric generating and transmission plants and reservoirs," the rest not being significant for these purposes.

But, again, the broad power to negotiate and enter into contracts with district or cities of this state for the lease, purchase, construction, extension, betterment, acquisition, operation and maintenance of all or any part of any electric generating and transmission plants and reservoirs.

The next statute would be 43.52.391, and that statute provides, "Powers and duties of an operating agency. Except as otherwise provided in this section, a joint operating agency shall have all powers now or hereafter granted public utility districts under the laws of this state." The next-to-last paragraph: "An operating agency may make contracts for any term relating to the purchase, sale, interchange or wheeling of power with the government of the United States and any agency thereof or any municipal corporation or public utility, within or without the state, and may purchase or deliver power anywhere pursuant to any such contract," omitting the remainder of the statute.

43.52.410, "Any city or district is authorized to enter into contracts of compacts with any operating agency or a publicly

or privately owned public utility for the purchase and sale of electric energy or falling waters."

And 550, "Any municipal corporation, cooperative or mutual which has entered into a contract with an operating agency to participate in the construction or acquisition of an energy plant as defined in Chapter 80.50 of the RCW, shall annually adopt a plan for the repayment of the contractual obligation," et cetera, et cetera, et cetera.

And the last statute in this chapter that is important, 43.52.910, "This chapter shall be liberally construed to effectuate its purposes."

If you look at the statutory scheme, there is very broad authority on the part of the operating agency and, as was argued by Mr. Yarmuth, given the fact that it is to be liberally construed, it appears to the Court the Legislature had in mind that they would be able to contract with the entities named for the very purposes of carrying out the functions for which they had legislative authorization to carry out.

54.16.040 is important in that it makes reference to, "A district may purchase, within or without"—this is referring to public utility districts—"A district may purchase, within or without its limits, electric current for sale and distribution within or without its limits, and construct, condemn, purchase, acquire, add to, maintain, conduct, and operate works, plants, transmission and distribution lines and facilities for generating electric current," et cetera, et cetera, et cetera, again indicating that public utility districts also have this power.

35.92.050 is important in this connection. It provides, "Authority to acquire and operate utilities. A city or town may also construct, condemn and purchase, acquire, add to, maintain and operate works, plants, facilities for the purpose of furnishing the city or town and its inhabitants, and any other persons, with gas, electricity, and other means of power," et cetera.

At the bottom part of the statute after the semicolon, the statute goes on to say, "Authorize the construction of such plant or plants by others for the same purpose, and purchase gas, electricity, or power from either within or without the city or town for its own use and for the purpose of selling to its

inhabitants and to other persons doing business within the city or town and regulate and control the use thereof."

The Metro case that has been cited has some application to this case. Again, it does not cover a situation such as we have here, but there is language in this case that is instructive on both the authority issue and the debt issues that we will be coming to in a moment.

The Court in the Metro case, and the Metro case also involved a financing operation, the Court cites RCW 35.21.210, "Any city or town shall have power to provide for the sewerage, drainage and water supply thereof, and to establish, construct and maintain a system or systems of sewers and drains and a system or systems of water supply, within or without the corporate limits of such city or town, and to control, regulate and manage the same." The Court goes on to say, "The statute grants to cities and towns the power to provide for a system of sewers within and without their corporate limits, and to control, regulate and manage the same. It must follow that with the power to provide a sewer system there is implied the power to pay for it unless otherwise prohibited by the charter or statute."

Basically, the power to purchase something carries with it the power to pay for it; the power to pay for it carries with it the power to make arrangements to pay for it. The cases have indicated a broad and liberal construction to be given the interpretation of these statutes. And cities, towns and districts are purporting to operate within these statutes so as to supply the services that the statute refers to, particularly when in doing so the public moneys are not obligated. And I recognize that that is a very sensitive term in this case, that the term "public moneys" in law has a specialized meaning, and that is tax revenues and revenues available to the general fund.

54.44, which is the statute that talks in terms of joint ownership of certain facilities, is, the Court believes, in the final analysis an enabling statute rather than a prohibitory statute, particularly in view of the myriad of other statutes that give cities virtually of any size the power to act in this fashion.

In addition to that, there are some restrictions in 54.44 that relate uniquely to ownership beyond that, to the extent that an ownership interest is considered significant. It is important to

observe that under the Participants' Agreement the participants have many of the indicia of ownership. For example, they have the power to approve or disapprove budgets both in the construction and post-construction phases, they also have the right to participate in the distribution of assets. There are some important indicia of ownership that they do not have. But in the final analysis, the Court is not of the view that 54.44 is intended to restrict, again given the cases that talk about the fact that cities or towns will have all the powers necessary to carry out the duties given them under these various statutes.

That brings us to the question of debt. The first question, of course, is whether there is debt. I think not in the constitutional sense of that word. Debt has been construed, for constitutional purposes in Washington, to involve only borrowed money. There are only two cases that I will refer to, there are many more; they have all been cited and extensively discussed in your briefs.

The first one that I will make reference to is State, ex rel. Troy v. Yelle 36 Wn. 2d at 192, Judge Hill speaking for the Court: " 'Debt' refers only to borrowed money and not warrants to meet current expenses. It is our interpretation that debt within the provision of Article 8, Sections 1, 2 and 3, is borrowed money and not warrant obligations for the payment of the current expenses of the state government, such as services rendered and materials furnished. Framers of the constitution had in mind two types of obligations, those for current expenses and those for the repayment of money borrowed. Constitutional provisions have reference only to the second type of obligation."

If that was the only case we had, the language would lend itself to being distinct. Probably the most authoritive statement on the subject is that of Judge Hill in State ex rel. Wittler v. Yelle 65 Wn. 2d, and I'm quoting on Page 669, that, "This court has historically considered state debts within the meaning of Article 8, Sections 1, 2 and 3 of the state constitution to mean obligations arising from the borrowing of money may be seen from a panoramic view of our cases affecting constitutional debt limitation. With but two exceptions, Allen v. Grimes and State ex rel. Troy v. Yelle, each involving warrants, all cases have concerned borrowed money, debts created by the issuance of

bonds. We know of no cases decided by us since statehood in which we have held Article 8, Sections 1, 2 and 3 applicable to other than borrowed money."

And for the constitutional purposes, as has also been pointed out in the argument and in cases cited in the brief, the provisions dealing with municipal authority are also included, the case of Winston v. Spokane being authority for that proposition.

Judge Hill goes on to say on Page 670, referring to State Building Financing Authority v. Yelle, he says, that "seems no exceptions to this line of cases for there we held that the issuance of bonds to finance the construction of public buildings through a leasing arrangement with the state's own institutions and agencies put the state in debt beyond the limits fixed by the constitution. Since under the act, the legislature was obligated to appropriate to each leasing institution and agency sufficient funds for rentals, we held on final analysis that the state was actually issuing bonds payable from general taxes. In short, it was borrowing money by selling bonds against the state general fund."

He also discusses State ex rel. State Finance Committee v. Martin, and he says, "Nor does"—this case—"depart from the idea that Article 8, Section 1, uses the word 'debt' to mean a debt incurred through the borrowing of money. When in that case we answered the question: What is a debt of the State of Washington? by saying it was an obligation which must in law be paid from any taxes levied generally, we were referring to debts created by the issuance of bonds to be redeemed from sales tax—excise taxes which are levied generally—hence debts created by borrowing money. Our reasoning in that case must be deemed peculiarly applicable to the facts then before us," and then he refers to cases from other jurisdictions, and he concludes by saying, "We have come to the conclusion, therefore, that, since the state has neither borrowed any money nor issued any bonds, debentures, certificates or other instruments by which a debt may be evidenced under and by virtue of the laws of 1963," et cetera, "we find both sections to be a valid and constitutional exercise of the legislative powers."

The answer to the question under the constitution is that we do not have borrowed money here as that term has been construed uniformly by the cases.

Now, with respect to statutory debt, even assuming that we have debt for statutory purposes, the special fund doctrine is applicable. Likewise, even assuming we have debt for constitutional purposes, the special fund doctrine is applicable. And with respect to a conditional sales contract, again assuming we have a conditional sales contract—and I don't make that assumption—even assuming we have a conditional sales contract, again the special fund would be applicable. The conditional sales contract talks as all other debt limitation statutes talk, and that is in the sense of placing a limitation with a ratio that is directly attributable to the tax assessments.

Insofar as an analysis of debt is concerned, there is a substantial problem with that analysis also, inasmuch as you must make a determination as to what the debt is at the time it is incurred. And Mr. Mack's arguments in that regard are persuasive.

The special fund doctrine. A very persuasive, forceful argument has been offered by Mr. White with respect to the functional equivalent test, that we are dealing with the functional equivalent of a tax. The difficulty with that analysis is that it is not supported by any of the cases. There is only one court in which there is a discussion along those lines, and that, of course, is the Piedmont case wherein it is discussed in the dissent. That is an intriguing, even appealing, analysis, and it may well be that the Legislature will wish to review debt limitation in this area. It may well be that in view of the facts of this case the Supreme Court will wish to reexamine its prior holdings and either indicate that they have been too narrowly construed or to narrow them or to expand them. But the fact of the matter is that under the current state of the case law, both in Washington and elsewhere, taxes mean just that, the general taxing power of the organ of government or the pledging of the full faith and credit of the entity involved.

If there is not the pledging of the full faith and credit of the entity involved and if there is not an invocation of the taxing power, then there is no violation of debt limitation statutes.

Our cases, and other cases talk even more specifically, talk in terms of a special fund being appropriate if the source of the funds is limited to the project for which the bonds were issued or if the funds come from some other source separate and apart

and completely distinct from the taxing authority. If that is the case, then the special fund doctrine applies.

The argument has been raised, and it has been addressed in cases, that how is this different from an excise tax, one doesn't have to purchase whatever object upon which there is an excise tax. The cases that have dealt with that have indicated that the reason that an excise tax is implicated is for the reason that is a general fund source of revenue; and therefore by pledging an excise tax you are dealing with the taxing power and you are also depleting the general fund.

So once again one is led back to the inevitable conclusion that under the current state of the law, user fees, public utility revenues do not fall within public moneys as that term is defined.

Now, as the Court has indicated, that argument has been strongly and persuasively advanced, but it is the function of a trial court to review the status of the current law and determine what that law requires, if it can.

Now, there are cases from other jurisdictions, and I want to refer to those in a moment.

I do want to talk about the risk analysis for a moment. There are two problems with the risk analysis. Assuming that it is defined as it was defined by those offering the risk analysis, the Washington cases have gone beyond a limitation to revenue-producing objects themsleves; for example, the state capital fund cases where the moneys to pay for the construction are coming from lands which were given to the state and dedicated for that purpose.

The argument has also been advanced that it must come only from what is then being constructed. The Twichell case in this jurisdiction doesn't stand for that proposition. There are cases in other jurisdictions that have followed the Twichell line of authority. So once again, that is what we are dealing with with respect to those two matters in Washington, at least given the state of the law today.

The risk analysis is defective, in the Court's view, for one additional reason, and that is the very term "risk analysis" requires one to consider what is it that the framers of the

constitution and what is it that the Legislature wanted to protect from risk. They wanted to protect the general revenues. So the risk analysis in its proper interpretation involves a consideration of just that. And, again, if you look through the cases, both here and in other jurisdictions, they always talk in terms of the source of the funds being the project or some other source, and they always emphasize that the taxing power hasn't been invoked.

So for purposes of debt, the Court is of the view that if, in the first place, there isn't debt at least insofar as the constitution is concerned, and if there is debt under the constitution and assuming the statutes that have been cited apply, the transaction in question is saved by the special fund doctrine. An I have already indicated why I believe that the executory or conditional sales contract must fall within the same analysis.

The Court is of the view that on the state of the record there are not fact questions with respect to the lending of credit. The cases that have been cited in that regard are persuasive with respect to a consideration for basic underlying public purpose of the venture. The Court is of the view that there is not a delegation of authority issue. The Court is of the view that the interstate compact clause is not implicated, principally for the reasons argued in Mr. Yarmuth's brief, and I will not go into more detail on that at this time.

Let me refer to the cases from other jurisdictions. Now, these cases all have distinguishing features: they involve either contracts with respect to power sales, enterprises that have differing features, or the statutory scheme is different. But there is language particularly as it relates to the user fee argument and the debt argument that are applicable with respect to this case.

In State v. Texas Municipal Power Agency, 565 Southwestern 2d 258, on Page 265 of the report, "The intervening cities have the authority to produce electricity for sale to their respective inhabitants. They therefore are authorized to contract with TMPA or other private corporations for the purpose of securing electric power for distribution to their inhabitants." This is authority for the proposition that there was basic authority to enter into this agreement. This case also talks in terms of the lending of credit, but I am more interested in what

it has to say with respect to the issues that were discussed and argued at length.

On Page 275 of the opinion the Court says, "In City of Big Spring v. The Board of Control the Court determined that the City of Big Spring had the authority to make a contract with the State of Texas to furnish water to the Big Spring Hospital in the exercise of a proprietary or business function. The Court stated, 'In such capacity a city can make a contract under the authority of legislative enactment in all things as an individual or private corporation.' "

This case does not turn on whether we have a proprietary or governmental function, because that distinction does not have the meaning in this state that it has in other states. The cases cited stand for the proposition that when you are making arrangements to supply electricity or to add to or improve your facility in that regard, you are probably acting in a governmental capacity. Also, the statutes and the cases and the provisions quoted indicated that in the course of doing so you have all the necessary powers to carry that out. The way you handle the sale of your energy in Washington appears to be a proprietary power.

But it is also important to note that in a case where you purport to deal only with the revenues that come from such a facility, you have, to a degree, a mixing of the concepts. And for authority purposes and for debt limitation purposes the courts have always looked closely to whether or not one is acting in such a fashion to implicate tax revenues. If one is not acting in such a fashion so as to implicate tax revenues, then the authority has been given a broad construction if it was the type of authority necessary to carry out the specific duty or obligation that one had. Now, that is simply going over in part what has already been analyzed.

In the Wyoming case of Frank v. the City of Cody, 572 Pacific 2d on 1114, "This court has consistently held that there is no debt against the municipality created within the purview of the constitutional limitation when the amounts due are payable solely from a special fund, not fed by taxes where prohibited, created from service charges only collected from users." Service charges are not a tax. They go on in the next column to say, "It is the prevailing view not only in Wyoming

but elsewhere that no debt is created within the constitutional limiting provision when the obligation is payable from the income of self-sustaining public utilities." In that case there was some language with respect to other funds legally available, and they talked in terms of the fact that that would not be available other than the public utility revenues.

So once again, if there is any language in an agreement that would indicate that in any way general revenues can be reached, then there is an issue. If not, the issue is normally found not to have any significance.

On Page 1117 of the opinion, "It is apparent that Cody and the other municipalities parties to the contract must get their electrical energy from some source. Where there are no limitations or restrictions as to a mode of contracting provided by the legislature to carry out a power plainly and expressly bestowed upon a municipality, the appropriate method is left to the discretion of municipal authorities, with the usual test of validity being whether the contract is reasonable."

Reasonableness, again, is based upon a consideration of what existed at the time the particular act was taken.

The last case that the Court will quote from is State ex rel. Mitchell v. the City of Sikeston, 555 Southwestern 2d at 281, and, again, as Mr. White pointed out in his argument, there are many distinguishing features with respect to a number of issues that are before the Court, but it has instructive language with respect to other issues that are before the Court.

On Page 292 of the opinion, "However, the obligation of the purchasing municipalities in this case is not an indebtedness within the terms of Article 6, Section 26(a) and (b) of the constitution." They go on to say that that has always been construed to be a debt which must be paid directly or indirectly by resort to taxation. And in the next column they say, "The proscription against municipal indebtedness without voter approval is only applicable in a situation where the municipality proposes to spend tax revenues." The last paragraph of the column, "Relators also contend that these contracts violate Article 6, Section 26(d), of the constitution because the obligations of the purchasing municipalities are unconditional." And they refer to a case cited and the Court says, "That case is

distinguishable, however, in that they proposed in addition to using the rentals from the hospital, to use tax receipts from the hospital district and therefore brought it within the indebtedness provisions of the constitution."

Now, there have been cases which have been cited and discussed in the oral arguments, again, that indicate that when the contract is worded as it was in the Participants' Agreement there is no danger that the general revenues of the city can be involved if a city is brought against the city. The Ellensburg intervenors and Ellensburg have raised this argument. It is clear from the cases that there is no liability, the sole liability being revenues produced by the revenues of the particular utility involved.

The Court indicated that it would discuss Section 6(d) of the contract. 6(d) of the contract says, "The Participants shall make the payments to be made to the Supply System under this agreement whether or not any of the projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either project for any reason whatsoever in whole or in part. Such payment shall not be subject to any reduction whether by offset or otherwise and shall not be conditioned on the performance or nonperformance by Supply System or any other participant or entity under this or any other agreement or instrument, the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy."

Now, Section 6(d) might be subject to the construction argued, in part at least, by the Supply System and Chemical Bank if there was a period after "instrument." It appears to the Court, and this question will be before the Court again as we continue, but it appears to the Court that Section 6(d) means this: It prevents a unilateral refusal to make payments on a claimed breach. It does not prohibit such a claim being raised in the context of litigation; otherwise, there would be no meaning to the language "the remedy for any nonperformance being limited to mandamus, specific performance or other legal or equitable remedy." At best it means that once it is determined that the contract has been validly entered into, the payments become unconditional, one may not unilaterally use

setoff or reduction, that the payments must continue until the claim of breach has been adjudicated in favor of the party claiming breach.

The argument here has been with respect to termination. The contract specifies a means whereby the Supply System through its board of directors may terminate a project. And in terms of following those steps, the steps were followed. It does not mean, however, that one is precluded from raising the argument that it was wrongful, that the standard was not applied and that therefore there was a material breach rendering any further performance inappropriate.

There is also an issue in the case with respect to whether prudent utility practices were used. It appears to the Court that there was not an intent on the part of the parties in entering into 6(d) to foreclose litigating these types of issues, but there was an intent to ensure that there would not be any unilateral setoff or reduction of payments, one would have to resort to one's legal or equitable remedy. A legal or equitable remedy is virtually unlimited; it allows all actions of law, it allows all actions for equitable relief.

The Court has indicated that there are contract validity questions still before the Court; The Court indicated that it did not feel that the record was in a posture where it could rule in that regard for the reason that the moving party, in this instance Chemical Bank, also the Supply System. Chemical Bank relied upon the agreement itself; the Supply System filed affidavits that related both to contract interpretation questions and, arguably, to other matters as well. Therefore, an apropriate period of time is necessary to allow participants to reply to any of those affidavits. The court can have another hearing to determine what fact issues, if any, remain for purposes of trial and what issues are appropriate issues for the Court to decide; and in that instance, the Court has cautioned that unless it is clear there are no fact disputes and it is clear that the Court can enter an order as a matter of law, one must approach summary judgment carefully because summary judgment can be granted only if it resolves or disposes of a claim in whole or in part. Judgment means exactly that, it must be final in the sense that it is a judgment. This therefore cannot be construed as a summary judgment. The motion to dismiss based upon lack of

authority is denied, the Court having ruled as a matter of law participants did have authority. The contract interpretation question must, at this stage at least, be in the form of an interlocutory order until the Court has had an opportunity to review and determine validity questions with respect to the contract. Once those are decided, it will be possible to determine how to proceed with trial. What the Court would anticipate is that the contract validity questions will be tried, with breach questions being separated for trial at some appropriate time in the future, given what the Court believes to be the correct construction of Section 6(d).

Now, the Court can hear from you, not today but at some later day, with respect to timing; I would suggest a period of two to three weeks for the parties to file any affidavits in reply to Supply System's affidavits as they relate to questions of contract validity, that we have a hearing to determine what issues remain for trial, and that following that, we proceed on the projected trial date of November 29th, or if a continuance is necessary in that regard, that the Court hear from you after you have had an opportunity to assess the impact of this ruling and that we still proceed on the assumption of attempting to resolve contract validity questions, preferably on the date indicated, November 29th, with consideration being given to the month of December or early January, if that should be necessary, but bearing in mind that the validity questions will probably be treated separately, therefore it may not involve the necessity for any time continuances.

Beyond that, it may be appropriate, when those have been determined, to assess the posture of the case to see any portions of it are at that time ripe for review; those are matters that we can discuss.

The Court has gone over its reasons with respect to the contract interpretation. I had intended to make reference to the fact that the argument in support of the participants' position was a detailed, sophisticated argument and obviously a prodigious effort, but it appeared to the Court that when the contract was read in its entirety, that it permitted only one reasonable meaning, and that was the participants undertook to pay debt service and all other costs for these projects whether completed or not; and it was for that reason that the Court

ruled. There are numerous provisions in the contract to support that provision: the triggering of termination dates, the fact that an annual budget commences at the earliest of those particular dates, the fact that the provisions in the annual budget make specific reference to debt service, the fact that the contract has a plain and clear explanation as to why construction costs were not included, particularly when you look at the sections that involve credits, 6.9 must also be read in connection with, I believe it is, 6.82. But in any event, I am sure all of you can recite these provisions now by heart, so you know what I am referring to.

The Court has appreciated the quality of the briefs and arguments. The Court understands that it is a difficult matter for everyone concerned, but the Court has given you as complete an analysis as it feels it is able to at this time.

We will be at recess.

APPENDIX F

IN THE

Supreme Court
OF THE STATE OF WASHINGTON

CHEMICAL BANK, a New York corporation,

Appellant,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Washington municipal corporation and joint operating agency,

Appellant,

PUBLIC UTILITY DISTRICT NO. 1 of Benton County, Washington; CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT Oregon; PUBLIC UTILITY DISTRICT NO. 1 of Chelan County, et al.,

Respondents,

MANDATE

No. 49868-7

King County No. 822068403

The State of Washington to:

The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on November 6, 1984, became the decision terminating review of this court in the above entitled case on December 17, 1984. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows:

Costs will be taxed by Supplemental Judgment.

Order Denying Motion for Reconsideration was entered herein on December 17, 1984.

[SEAL]

TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of December, A.D. 1984

REGINALD N. SHRIVER
Reginald N. Shriver
Clerk of the Supreme Court,
State of Washington

cc: Counsel as Attached
Reporter of Decisions

APPENDIX G

296 Or. 550, 679 P.2d 1316

Peter DeFazio, David Dix, Leslie Ratley, Gwen E. Ross, William F. Palmer, Fred McDaniel, Norma McDaniel, Frederick B. Simmons, Robert R. Davis, John C. Montgomery, Robert N. Faught, Mary Boyersmith, Lloyd Larry Roberson, Harold Loroy Davis, Fred J. Stigall, Paul M. Stewart, Harold Eller, Terry Bollenbaugh, Gary W. Ensign, Will Brown, Rhonda Sparks, Bonnie Charles, Michael Faught, Glenn Sofge, William E. Morrisette, and Janice M. Morrisette (Springfield Ratepayers); Cascade Steel Rolling Mills, Inc., An Oregon Corporation; Cascade Tractor & Implement Co., An Oregon Corporation; McDaniel Feed & Grain Co., An Oregon Corporation; Jack Wright; Waldo Farnharn; John Jankowski; Charles E. Colvin; A.E. Hurl; Chuck Neilson; Stan Amundson; Merle Lingle; Hans Simon; Jerry Lucas; William B. Nourse; Doyle Smith; Chester McDonough; Ezra Koch; Bill O'Dell; Gary Brooks; Chester Gibson; Del Casteel; (McMinnville Ratepayers);

Plaintiffs-Respondents/
Cross-Appellants,

The City of Drain, A Municipal Corporation (Drain); Canby Utility Board, An Independent Governmental Subdivision of the City of Canby, A Municipal Corporation (Canby Utility Board); The City of Bandon; A Municipal Corporation (Bandon); The City of Cascade Locks, A Municipal Corporation (Cascade Locks); Donald Maples; John Bendele; Jack Barber; and Charles Robert Miller (Drain Ratepayers);

Plaintiffs-Respondents,

v.

Washington Public Power Supply System, a Washington Municipal Corporation (WPPSS); City of Springfield, A

Municipal Corporation, Acting By and Through The Springfield Utility Board (Springfield); City of McMinnville, A Municipal Corporation, Acting By and Through Its Water & Light Commission (McMinneville); City of Milton-Freewater, A Municipal Corporation (Milton-Freewater);

Defendants-Appellants/
Cross-Respondents,

Northern Wasco People's Utility District, A Municipal Corporation and People's Utility District of The State of Oregon; Tillamook People's Utility District, A Municipal Corporation and A People's Utility District of The State of Oregon; Clatskanie People's Utility District, A Municipal Corporation and People's Utility District of The State of Oregon; and Central Lincoln People's Utility District A Municipal Corporation and People's Utility District of The State of Oregon,

Defendants-Respondents.

TC 16-81-11344; CA A26721; SC 29649

Supreme Court of Oregon,

In Banc.

Argued and submitted June 9, 1983.

Decided March 20, 1984. Rehearing Denied May 1, 1984.

Reversed and remanded.

Lent, Linde and Roberts, JJ., filed a concurring opinion.

Peterson, C.J., filed a concurring opinion in which Campbell, Carson and Jones, JJ., joined.

James H. Clarke, Portland and Bruce Smith, Eugene, argued the cause and submitted brief for Defendant-Appellant/Cross-Respondent Washington Public Power Supply System. With them on the brief were Frank Gibson and Cass, Scott, Woods & Smith, Eugene; David H. Wilson, Jr. and Spears, Lubersky, Campbell, Bledsoe, Anderson & Young, Portland; Richard C. Yarmuth and Culp, Dwyer, Guterson & Grader, Seattle, Wash.

Garry P. McMurry, Portland, argued the cause and submitted brief for Defendants-Appellants/Cross-Respondents Cities of Springfield, Milton-Freewater and McMinnville. With him on the brief were Peter A. Mersereau, James A. Fitzhenry and Rankin, McMurry, VavRosky & Doherty, Portland; Douglas E. Hojem and Corey, Byler & Rew, Pendleton; David C. Haugeberg, Gary A. Rueter and Haugeberg & Rueter, McMinnville.

Robert L. Ackerman, Springfield, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants Springfield Ratepayers. With him on the brief were Ackerman, DeWenter & Huntsberger, Springfield, and Lawrence D. Salmony, Certified Law Student, Springfield.

Martha L. Walters, of Johnson, Harrang & Swanson, Eugene, argued the cause for Plaintiffs-Respondents City of Drain, Drain Ratepayers and City of Bandon. With her on supplemental briefs were John H. Hammond, Jr., Oregon City, representing Plaintiff-Respondent Canby Utility Board and Wilford K. Carey, Jr., Hood River, representing Plaintiff-Respondent City of Cascade Locks.

John R. Faust, Jr., Portland, argued the cause and filed brief for Defendants-Respondents Central Lincoln People's Utility District and Clatskanie People's Utility District. With him on the brief were Donald A. Haagensen, Mildred J. Carmack and Schwabe, Williamson, Wyatt, Moore & Roberts, Portland. With him on memorandum of additional authority was George P. Winslow, Jr., Tillamook, representing Defendant-Respondent Tillamook People's Utility District. With him on additional authorities was Stanley D. Heisler, The Dalles, representing Defendant-Respondent Northern Wasco People's Utility District.

Willard L. Cushing, McMinnville, argued the cause and filed brief for Plaintiffs-Respondents/Cross-Appellants City of McMinnville Ratepayers. With him on the brief was Cushing, Johnstone & Peterson, P.C., McMinnville.

LINDE, Justice

In 1976, the Washington Public Power Supply System and 88 governmental and cooperative entities in six states entered into a set of agreements under which the system, hereafter designated WPPSS, would construct and operate two nuclear-powered generating plants, Washington Nuclear Projects (WNP) 4 and 5, and the participating entities, referred to as the "participants," would be entitled to fractions of the power generating potential of these plants in return for specified financial obligations. The present litigation concerns the question whether various Oregon participants could legally commit themselves to the terms of these agreements. Upon suit brought in 1981 by ratepayers of the City of Springfield, one of the participants, later joined by a number of other private and municipal plaintiffs, the circuit court rendered a judgment declaring the Participants' Agreements executed by seven cities and four People's Utility Districts to be *"ultra vires,* void and invalid." Defendants appealed, and we accepted certification of the appeal by the Court of Appeals to this court pursuant to ORS 19.210 and ORAP 17.05.

I. THE PARTIES' POSITIONS

Because some of the issues are common to several parties and others are not, it is necessary to sort out the parties' positions in this action.

The action began with a complaint filed on December 22, 1981 by plaintiffs DeFazio, Dix, and Ratley, as consumers of electricity distributed by the Springfield Utility Board, an agency of the City of Springfield, against the City of Springfield and the Washington Public Power Supply System, alleging the invalidity of the city's agreement with WPPSS and seeking declaratory relief. During the months of March to May, 1982, motions to intervene were filed by the cities of Drain, Bandon, Cascade Locks, Milton-Freewater, McMinnville, and the Canby Utility Board, by ratepayers served by the cities of Drain and McMinnville, and by the Clatskanie, Central Lincoln, Tilla-

mook and Northern Wasco People's Utility Districts (PUDs). The circuit court allowed these motions on May 26, 1982, and the parties filed an amended consolidated complaint on July 13, 1982.

Although the procedure placed among the defendants some who deny the validity of the agreement, specifically the PUDs, no question is raised about this procedure. Rather than refer to the parties as plaintiffs and defendants, we ordinarily shall refer to WPPSS as the main proponent of the Participants' Agreements, joined in part by the cities of Springfield, McMinnville, and Milton-Freewater, and to the opponents respectively as the ratepayers, the cities, and the districts or PUDs.

The ratepayers and some of the cities contend that they lack charter authority to enter into the agreements and that special statutory procedures were the exclusive means for joining with others in financing generating facilities. They also contend that by promising unconditionally to pay a share of the project costs whether or not they received any electricity in return the cities incurred debts that may only be incurred by charter amendments or other consent of their qualified voters, and that they unconstitutionally invested in or lent their credit to WPPSS. Finally, they attack the agreements as unlawfully delegating the authority of city officials over electric rates by committing future rates to cover whatever payments would be required under the agreements.

The cities of Springfield, Milton-Freewater, and McMinnville deny these contentions. Among other arguments they maintain that the Participants' Agreements imposed no obligation on the participants to pay for construction costs, or debt service on such costs, if the projects were terminated before commencing operation, as WNP 4 and 5 in fact were. The actual legal consequences of the termination are not before us in this litigation, because the plaintiffs sued for a declaration that the Participants' Agreements were unlawful when they were made.

The PUDs argue that the obligations assumed in the Participants' Agreements constituted long-term indebtedness of the PUDs equivalent to revenue bonds and could be accomplished only with approval by the PUD's qualified voters. Like the other opponents, the PUDs contend that they could join with others in financing the projects only under statutes that were not followed, that they lacked authority to guarantee the debts of other entities such as WPPSS, that the agreements were an unconstitutional investment or lending of credit, and that the agreements unlawfully delegated their authority over their operations and electric rates. They also claim that the agreements were void as being against the public policies represented by these legal restrictions.

The proponents reject all attacks on the transactions, maintaining that the agreements were purchase contracts within the ordinary legal authority of the cities and PUDs. They contend in turn that plaintiffs' claims should have been dismissed as barred by laches or by estoppel.

The logical sequence is to take up, first, a challenge to the timing of the plaintiffs' action; then issues of the cities' and districts' authority, then limitations on that authority found in their charters or in statutes, and finally constitutional limitations. In this instance, issues common to all parties will precede some arguments that depend on separate provisions governing different participants. Because the court is in disagreement on the analysis of the timing issue, that discussion appears at the end of the opinion.

Each of the substantive positions has been exhaustively briefed and argued with great ability and, taken individually, with much persuasive force. The briefs and supplements total 1,513 pages without conspicuous waste, and an opinion responding to each argument in detail would threaten to become nearly as long.

The major arguments, however, have a common theme. There is no important disagreement about the facts. There is substantial agreement about much of the governing law. Some

contentions do not require extensive discussion. For these reasons we shall not discuss all the decisions and other informative sources that have been cited. The major arguments hinge on characterizing the agreements by which the participants undertook to reimburse WPPSS from their power revenues for the costs of financing, building, and operating two nuclear power plants in return for a share of whatever electric power, if any, those plants would deliver to the region's distribution grid.

The proponents contend that the agreements are what they purport to be; contracts to assure the participating utilities of a share of future thermal power generation that WPPSS would undertake to produce, contracts executed with the recognition that the undertaking might fail but that it could not be attempted unless the contracts covered the costs of an unsuccessful attempt. The opponents describe the agreements as an attempt to disguise substance by form, a poorly camouflaged effort to obtain revenue financing of the proposed plants by the participants while circumventing the voting procedures and debt limitations by which statutes, charters, and constitutions seek to guard against such fiscal folly. The proponents insist that it is perfectly proper to structure transactions within legally available forms and that these forms must remain reliable under the stress of failure.

Certainly these transactions were designed and piloted on their way with every effort to stay in an apparently open channel among the legal shoals; they had to be, to reach the financial markets. But the opponents contend that the design, whether born of excess optimism or of desperation, actually sank at its launching.

For the reasons that follow we hold that the local officials who entered into the challenged agreements in 1976 had legal authority to do so, and that in doing so they did not violate constitutional or other legal prohibitions. We therefore reverse the circuit court. This proceeding involves no question of the legal consequences and present enforceability of the agreements in the light of developments after the agreements were executed, and we express no view thereon.

II. THE PARTICIPANTS' AGREEMENTS

The Washington Public Power Supply System, organized in 1957, is a municipal corporation and a "joint operating agency" under Washington law. RCW 43.52. It is an association of 19 Washington public utility districts and four Washington cities. Its role in financing facilities to generate power for distribution by nonmembers grew from the search by the federal Bonneville Power Administration and the region's utilities, through such planning groups as the Public Power Council and the Pacific Northwest Utilities Conference Committee, for ways to meet the region's expected future power needs by means other than the federal appropriations that built most of the large hydroelectric projects from the 1930s to the 1950s.

Under one such arrangement, WPPSS financed and owns the region's first major thermal generating plant, a nuclear reactor at Hanford, Washington, that was authorized by Congress in 1960 and completed in 1966. The projected output of the Hanford reactor was integrated into the Bonneville system by assuring participating utilities of firm power from BPA in return for their shares of the Hanford output, whether or not the Hanford project in fact produced any power. BPA promoted the construction of additional generating plants in various ways. One of these was the device of "net billing," by which utilities financing the plants would assign their share of the generating capacity to BPA in exchange for credits on hydroelectric power purchases from BPA. Because this arrangement assured that the utility would receive BPA power to the amount of payments so credited, BPA in effect assumed the risk that the generating capacity assigned to it would fall below expectations. This device was used for the Trojan nuclear power plant at Rainier, Oregon, and for three earlier WPPSS plants. Washington Nuclear Projects (WNP) 1, 2, and 3. BPA withdrew the "net billing" device for the two projects, WNP 4 and 5, that are involved in the present litigation. BPA nevertheless encouraged its "public power preference" customers to go forward with WNP 4 and 5, predicting a deficiency in

ers to go forward with WNP 4 and 5, predicting a deficiency in federally generated power for their needs, but BPA did not offer protection against the possible failure of these projects corresponding to the earlier arrangements.[1]

In order to finance projects WNP 4 and 5, WPPSS executed five sets of contracts. Those relevant to the present issues are the Participants' Agreements and a bond resolution for the sale of bonds to investors which is incorporated in the Participants' Agreements. There also is an agreement for assigning to WPPSS for resale any power that a participant might not use, an agreement for acquisition by Pacific Power and Light Company of a 10 percent undivided ownership share in project 5, and an agreement for short term sales of power to certain industries.

A number of the disputed issues depend on how the Participants' Agreements are characterized.

The agreements themselves are written as contracts for the sale of shares of "project capability," a phrase which in turn is defined to mean "amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time." Under the terms of the Participants' Agreements, WPPSS undertook the financing, design, construction, operation, maintenance, and eventual termination of the power plants, to issue and service bonds for that purpose, and to deliver power from the plants to the federal transmission grid for the account of each participant. The participants, in turn, promised to pay proportionate shares of the costs of constructing, operating, and terminating the two projects, whether or not they received any power from them. Each agreement went into effect only when agreements allocating 100 percent of the projects' capability and costs were executed. An "Official

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[1] This background is set out in greater detail in several sources. *See* Hittle, *et al., Pacific Northwest Power Generation, Multi-Purpose Use of the Columbia River, and Regional Energy Legislation: An Overview,* 10 Env.L. 235, 245-250, 262-274 (1980); Foote, Larsen and Maddox, *Bonneville Power Administration: Northwest Power Broker,* 6 Env.L. 831, 839-852 (1976); *Natural Resources Defense Council v. Hodel,* 435 F.Supp. 590 (1977); *Chemical Bank v. Wash. Pub. Power Sup. System,* 99 Wash.2d 772, 666 P.2d 329 (1983); *Asson v. City of Burley,* 105 Idaho 432, 670 P.2d 839 (1983).

Statement" issued by WPPSS in marketing its bonds summarized the agreement as follows:

> "Each Participant is obligated to pay the Supply System its share of the total annual cost of the Projects, including debt services on the Bonds . . . whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output."

Certain other provisions of the Participants' Agreements are important. Participants undertook to make payments only from electric utility revenues; in turn, each promised to maintain electric rates high enough to cover its payment to WPPSS along with its other obligations.[2] A participant's share could increase as much as 25 percent if another participant of the same type were to default. This step-up clause was designed to cover possible gaps in financing.[3] The agreements provide for

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[2] Section 6(c):

"No Participant which is a statutory preference customer of Bonneville shall be required to make any payments to Supply System under this Agreement except from the revenues derived by such Participant from the ownership and operation of its electric utility properties. Such Participant covenants and agrees that it will establish, maintain and collect rates or charges for power and energy and other services, facilities and commodities sold, furnished or supplied by it through any of its electric utility properties which shall be adequate to provide revenues sufficient to enable the Participant to make the payments to be made by it to Supply System under this Agreement and to pay all other charges and obligations payable from or constituting a charge and lien upon such revenues."

[3] Section 17(c):

"If the Participant is a municipal corporation, upon default on the part of any other such Participant(s) which is a municipal corporation the Participant's Share shall be automatically increased for the remaining term of this Agreement pro rata with that of other such nondefaulting Participant(s) to the extent that such defaulting Participant(s) fails or refuses for any reason to perform its obligations under its Participants' Agreement, and the Participant's Share of such defaulting Participant(s) shall be reduced correspondingly; *provided,* that the sum of all such increases for the Participant pursuant to this Subsection shall not exceed, without consent of the Participant, an accumulated maximum of 25% of the Participant's Share."

election of a Participants' Committee with powers to review proposals of WPPSS on specified subjects and, in case of disapproval, to submit the matter to a Project Consultant.

By its Bond Resolution 890, WPPSS authorized issuance of revenue bonds to finance the construction of WNP 4 and 5. The resolution covenanted that WPPSS would collect revenues from charges for power, "including capability," sufficient to service the bonds and that it would not rescind or amend the participants' obligations or payments. Chemical Bank was named as the bond fund trustee and empowered to enforce the agreements. A provision of the Participants' Agreement, in turn, "recognized" that WPPSS was bound to comply with the Bond Resolution, among other regulatory and contractual obligations, and provided that "this Agreement is made . . . subject to the terms and provisions of . . . the Bond Resolution" and regulatory requirements.

In short, the transactions were designed so that WPPSS could raise the capital needed to build two nuclear power plants by assuring that 100 percent of the costs would be recovered through irrevocable contracts with distributing utilities, which agreed to maintain their own rates high enough to meet those costs but were not obliged to meet them from any other source of funds.

At the time of this litigation, WPPSS had terminated the projects after raising and spending several billion dollars toward their construction, when accumulating costs and marketability of power at the resulting prices proved vastly different from the initial assumptions. These events, however, do not bear on the issues before the court, apart from illustrating the risk that was present from the beginning.

The question whether the cities and PUDs had authority to enter the transaction will not be judged by hindsight. That question is important beyond this case and will remain important for the future ability of the cities and districts to serve their communities, unless their authority is changed by law. It will not be decided with a view to the fate of WPPSS projects and

its consequences. The answer must be the same as if the project still promised to deliver power at reasonable cost, and the cities and PUDs were defending their participation against a challenge, for instance, by opponents of nuclear power seeking to attack the legal basis for the projects.

III. NONCOMPLIANCE WITH STATUTES

On two occasions, the Legislative Assembly responded to the concern of cities and PUDs by providing new statutes under which these public entities might join others in securing the thermal generating capacity that federal agencies could not provide. It enacted the Thermal Power Facilities Act (TPFA), Or. Laws 1967 ch. 603, and the Joint Operating Agency Act, Or. Laws 1973 ch. 722. The cities and PUDs did not use either of these statutes in their agreements to purchase "power capability."[4] The parties dispute whether failure to follow these statutes is fatal to the agreements, either because there is no other authority to participate in the kind of projects undertaken here, or because the specific statutory provisions displace whatever authority otherwise might exist.

The Thermal Power Facilities Act, codified with respect to cities in ORS 225.450-225.490 and with respect to PUDs in ORS 261.235-261.255, declared it to be in the public interest that cities, districts, electric cooperatives, and electric utility companies "participate as authorized in [the act]" to achieve economies of scale and to meet future power needs. ORS 225.460, ORS 261.240. The same sections direct that the act be "construed liberally" to effectuate those purposes. The act provides that "[i]n addition to the powers otherwise conferred" on cities and on districts respectively, each "may plan, finance, construct, acquire, operate, own and maintain an undivided

[4] The cities also did not make use of the authority given cities in ORS 225.060 "either severally or in joint agreement [to] purchase, own, operate and maintain any works in an adjoining state necessary or pertinent to the furnishing of electric power. . . ."

interest in common facilities" jointly with other utilities or any combination thereof, "and may make such plans and enter into such contracts and agreements as are necessary or appropriate for such joint planning, financing, construction, acquisition, ownership or maintenance." ORS 225.470, ORS 261.245. When proceeding under the act, each city or district "shall be liable only for its own acts," and no money contributed by it may be credited to another participant. ORS 225.480, ORS 261.250. Each may "furnish money and provide property" and sell revenue bonds "pledging revenues of its electric system and its interest or share of the revenues derived from the common facilities . . . in order to pay its respective share of the cost" thereof. ORS 225.490, ORS 261.255.

The opponents point to enactment of this statute to show that prior to 1967 the cities and PUDs lacked authority to join with others in combined transactions of the kind before us. The testimony they quote from the legislative history shows that some witnesses doubted that such authority existed, and legislators may have shared those doubts. But that cannot be used to show what the prior state of the law actually was. The views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors. Moreover, witnesses and legislators alike would know that legal doubts alone could prove fatal to successful participation in any financing plan, however lawful it actually might be. It is perfectly sensible to meet such doubts by providing the desired statutory authority, whatever the prior authority might cover. TPFA's use of parallel provisions for the cities and the districts further demonstrates that the purpose was to provide each with assured authorization "[i]n addition to the powers otherwise conferred," for these powers are not otherwise identical.

The 1967 act shows that the legislators wanted Oregon cities and PUDs to be able to join with others in planning, financing, building, operating, and owning common facilities, and that they wanted this authority to be "construed liberally." ORS 225.460, ORS 261.240. The act also shows that they

wanted each city and district to be liable only for its own share, and that if it needed to issue revenue bonds, this would require the normal procedures prescribed in the city charter, ORS 225.490, and the PUD statutes, ORS 261.255, 261.355. Except for these constraints, the language of the TPFA is the language of authorization, not of limitation. We do not read the stated public policy that the cities and districts "participate as authorized" in the act to mean "only as authorized" therein. We are not persuaded that the TPFA was meant to supersede other powers available to cities or PUDs.

The second statute, the Joint Operating Agency Act, enacted in 1973, is codified in ORS 262.005—262.115. It authorizes three or more Oregon cities or PUDs to form a "joint operating agency to plan, acquire, construct, own, operate and otherwise promote the development of utility properties in this state for the generation and transmission of electric power and energy," and to join with other entities for that purpose, and it authorizes such a joint operating agency to participate in joint ownership of thermal plants in accordance with the TPFA. ORS 262.015. Given the TPFA, this second act clearly is supplemental, not exclusive, authority. The only claim made for it is that, along with the TPFA, it represents a legislative "offer" of otherwise nonexistent "extramural" authority to the municipalities, an issue dealt with later in this opinion.

We conclude that if the cities and PUDs otherwise had authority to enter the agreements challenged in this litigation, enactment of the two statutes did not supersede that authority or restrict it, except for the policy against financing another participant's share that is expressed in ORS 225.480 and ORS 261.245.

IV. APPLICABILITY OF BOND PROCEDURES

The opponents attack the Participants' Agreements for failing to comply with provisions in charters, statutes, and the constitution that impose procedural rules and substantive limits on incurring public debts. Some of these rules relate specifically to the issuance of bonds.

If the PUDs or the cities themselves had issued revenue bonds, they would have had to obtain the approval of their respective voters, the PUDs by virtue of ORS 261.305(6), ORS 261.355 and ORS 261.375(1), the cities by virtue of charter

provisions. Of course, the PUDs and cities did not issue bonds, WPPSS did. The opponents argue, however, that the obligations incurred in executing the Participants' Agreements were the equivalent of revenue bonds and therefore required voter approval. The argument is stated in several ways. The participants' payments to WPPSS retire a debt incurred by WPPSS on their behalf which they have the sole responsibility to repay; therefore the participants must "treat this bonded obligation as their own." Construction of the projects by WPPSS on the strength of the participants' unconditional obligations to pay the costs was a "scheme" or "artifice" designed to circumvent voting requirements and other legal constraints. WPPSS, the opponents say, is only a "conduit" between the participants and the bondholders.

These descriptions do not make entirely clear whether the argument is that the participants are the true debtors of the bondholders and the bonds issued by WPPSS are really their bonds, or rather that the Participants' Agreements, by "pledging" future power revenues to pay all costs incurred by WPPSS, themselves constitute "bonds" issued to WPPSS. The opponents do not claim that either statement is literally true. The participants did not incur direct debts to the holders of WPPSS bonds, though their unconditional promises to pay the total costs of WNP 4 and 5 were the only source from which WPPSS would pay those bonds. Likewise, the participants borrowed no money from WPPSS that they promised to return with interest; what they expected to get for their future payments was electric power, expressed as a share in the generating capability of the projects. But the opponents claim that in substance, if not in form, the transactions were the same as issues of revenue bonds by the PUDs and cities themselves.

To support their claim that the court should look through the legal form to the economic substance of the transaction, the opponents rely on *Martin v. Oregon Building Authority*, 276 Or. 135, 544 P.2d 126 (1976). That case arose upon special statutory review of the constitutionality of an act creating a building authority as a means to buy or construct buildings with

revenue bond financing for lease to state agencies, and the court invalidated the act as an attempt to "create any debt or liability" exceeding $50,000 in a manner forbidden by Article XI, section 7, of the constitution. To show how the court reached that conclusion, we review the case in some detail.

The law at issue in *Martin* created the Oregon Building Authority as an "independent public body politic and corporate" for the purpose of developing "necessary facilities" for the state at an advantageous cost. The building authority's board of directors was composed of the State Treasurer, the Attorney General, and the Director of the Department of General Services. The building authority was empowered to finance the acquisition of buildings for lease or sale to state agencies by issuing notes and bonds which were to be payable solely from the building authority's revenues or other assets and expressly were not to be a "debt or liability of the state." Revenues obtained from leasing or selling buildings to the state would be pledged as security for payment of the bonds and channeled through a trust fund administered by an independent trustee. At the time of the litigation, the board of directors had adopted resolutions for the issuance of bonds to finance seven projects, including the construction of new wings for the capitol. Each was to be leased to the state under leases which fixed the rent at the amount of debt service on the bonds plus the building authority's operating expenses. The court found that the state's obligation to pay rent was unconditional and "supported by the state's full faith and credit." 276 Or. at 138-139, 554 P.2d 126. The rentals were assigned to the trustee or trustees for the benefit of the bondholders.

Justice Holman's opinion for the court began by reviewing the origins of constitutional debt limitations in the 19th century in response to excessive government borrowing, primarily for transportation facilities, which often led to defaults. The opinion then stated:

> "It is generally agreed that in imposing debt limitations, 'the predominant purpose was the achievement of a high degree of control over debt creation in order to

> forestall irresponsibly imposed tax burdens * * *.' The Oregon cases have stated that our provision 'was adopted by the people as a protection against burdensome and excessive taxation' and that it was intended 'to prevent exposing the sources of public revenue to potential hazard.' Long-term obligations create a fixed charge against future revenues and can impair the flexibility of planning and the ability of future legislatures to avoid a tax increase. Debt restrictions force the elected representatives of the people to operate the government within its means and remove the temptation to undertake projects on an enjoy-now, pay-later basis."

276 Or. at 141, 554 P.2d 126 (footnotes omitted). The opinion observed that building authorities were a controversial device to skirt debt limitations, though they had been upheld in a majority of cases in other states. To sustain the Oregon Building Authority would depend on finding that neither the authority's bonds nor the state's leases were debts within the constitutional prohibition.

The court noted that the bonds might escape the prohibition if the issuer were truly independent of the state, or if they were revenue bonds even if the issuer was considered a state agency. The revenue which was pledged to support these bonds, however, was future government rents payable from funds raised by taxation. As to independence from the state, the court thought the status of the building authority comparable to that of the university regents in *McClain v. Regents of the University,* 124 Or. 629, 265 P. 412 (1928), whose dormitory construction bonds had escaped the debt limitation only because they were revenue bonds. The building authority, the court noted, "is managed and controlled by state officers, it must report periodically to the Governor and must obtain legislative approval for certain of its actions, and it is maintained largely by public funds. Its sole purpose is to implement the building policies of the state." The main difference from the university regents was the legislature's description of the authority as an "independent body." 276 Or. at 144, 554 P.2d 126.

The court concluded that when the transactions were viewed as a whole, the separate existence of the building

authority must be disregarded. It reached this conclusion in essence because the building authority had no purpose other than to borrow money, because its income was assigned to trustees, because the state was its only possible tenant, because the authority had no other use for the structures it financed, and because the leases delegated responsibility for handling construction of the authority's projects to the state. 276 Or. at 144-145, 147, 554 P.2d 126.[5] The court therefore described the building authority as a "gutless intermediary" whose sole function was to insulate the actual relationship between the bondholders and the state from the constitutional debt limitation, and it summarized its holding to be "that for constitutional purposes we are going to look through the dummy corporation and that the bonds are the debts of the state." 276 Or. at 145, 147, 554 P.2d 126.

Although the issue presently under discussion is not debt limitation but voting requirements, the opponents of the Participants' Agreements argue that the similarities of the financing arrangements in this case to those in *Martin* equally require us to disregard the separate existence of WPPSS and to treat the bonds issued by WPPSS as the participants' bonds. The economic similarities are great. In both cases, unconditional commitments of governmental customers to pay for future services were used by bond issuers to finance facilities for the exclusive benefit of those customers; the amount of future payments was tied to the costs of financing the projects; and those payments were the only source of repayment for financing the acquisition, construction, and operation of the projects. In both cases, also, the transactions were designed to avoid borrowing by the governmental users by having a supplier rather than the user borrow the needed funds on the strength of long-term user agreements covering the entire cost of the projects.

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[5] The issue of financing state buildings by long-term leases in *Martin* was complicated by the fact that Or. Const. Art. XI, § 7 was amended in 1964 to except such leases from the debt limitation. The court, and Justice O'Connell, concurring, found the exception inapplicable because the lease payments to the building authority were pegged to recovery of costs, not to fair rental value. 276 Or. at 150-158, 554 P.2d 126.

The differences between the Oregon Building Authority and WPPSS are equally obvious. The building authority was created by the state government solely as an instrumentality to finance its own need for buildings. It was directed by a board composed of the chief legal, financial and property management officials of the state govenrment. Whatever the building authority act meant by the phrase "independent public body politic and corporate," such a board could no more be a "body politic" divorced from state government than, for instance, the State Land Board composed of the Governor, Treasurer and Secretary of State.[6] WPPSS is not a creation of the Oregon participants in WNP 4 and 5, or of all the 88 participants in those projects; as stated above, it was organized under Washington law in 1957 as a statutory municipal corporation and joint operating agency of 19 Washington public utility districts and three Washington cities. WPPSS is not "managed and controlled" by officers of the government with which it contracted, as the *Martin* court observed of the building authority. Moreover, WPPSS did not, like the building authority, delegate to the user agencies the responsibility for construction of the projects it would finance for them.

Again, it must be remembered that the present discussion does not concern the question whether the Oregon participants incurred "debts," but whether the participants are the actual—and unauthorized—issuers of the bonds sold to finance WNP 4 and 5 because the separate existence and role of WPPSS should be disregarded like that of the building authority in *Martin*. On this question the economic similarity of the financing devices is not decisive. The commitment of an agency's long-term contract as security, even as the sole security, for financing a building, a power plant, or another source of supply dedicated to the agency's use does not turn WPPSS or any otherwise independent supplier into a "dummy corporation" of the contracting agency. WPPSS was used as the vehicle for building thermal generating projects for the participants precisely because it already had an independent existence and bonding capacity. The *Martin* decision does not support a holding that would disregard this independent existence of WPPSS as the issuer of its bonds.

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[6] *See* Or. Const.Art. VIII, § 5; ORS 273.031.

V. DEBT LIMITATIONS

The Participants' Agreements obligate each participant to make its contractual payments to WPPSS whether or not the projects are completed and whether or not they produce electric power. These payments, however, are to be made only from the participant's revenues derived from the operation of its electric utility properties.[7] The parties dispute whether the obligations are debts or indebtedness, as those terms are used in the various laws applicable to such debts, or escape these laws because they are payable only from electric power revenues. The arguments concerning the cities differ from those concerning the PUDs and we deal with each separately.

The issue whether the cities' unconditional commitments to WPPSS constitute debts arises under the individual city charters. When cities were incorporated by individual legislative acts, Article XI, section 5 of the Oregon Constitution required such acts incorporating cities to "restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." One city, Springfield, still has a statutory charter; the others adopted their own charters after Article XI, section 2, shifted that function from the legislature to the cities them-

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[7] In addition to section 6(c), footnote 2, *supra,* section 6(d) provides:

> "The Participant shall make the payments to be made to Supply System under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy."

selves.[8] Each has a debt limitation in its charter, but they are not identical.[9]

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[8] One statute relating to municipal bond issues, ORS 287.004, generally limits a city's outstanding bonds to three percent of its property tax base but excepts bonds issued for "power" purposes (presumably electric power) among others. The same section expressly requires voter approval for city bond issues only when required by the city charter or by another statute.

[9] Springfield Charter, Art VII, § 54:

"The common council of said city shall not in any way create any debts or liabilities which shall singly or in the aggregate exceed the sum of $500.00, except as in this charter otherwise specifically provided."

McMinnville Charter, ch XI, sec 64:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $100,000.00 at any one time. . . ."

Milton-Freewater Charter, ch X, sec 2:

"Except by the consent of the voters the voluntary floating or warranted indebtedness of the city for general purposes shall not exceed $25,000.00 at any one time provided, that the legally authorized debt of the municipalities of Milton or Freewater existent at the time of the adoption of this Charter shall not be included in such indebtedness for purposes of calculating the limitation."

Drain Charter, ch XII, sec 1:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $25,000.00; not its bonded indebtedness $250,000.00 at any one time. Bonded indebtedness to be by amendment to charter. . . ."

Canby Charter, ch XII, sec 1:

"Except for bonds heretofore or hereafter authorized, the City's voluntary floating indebtedness shall not exceed $25,000.00. For the purposes of calculating the limitation, however, the legally authorized debt of the City in existence at the time this Charter takes effect shall not be considered, and all bonds of the City heretofore issued and unpaid at the time this Charter takes effect shall remain and continue to be the obligation of the City of Canby until the same are paid. . . ."

Cascade Locks Charter, ch X, sec 40:

"Except by consent of the voters, the city's voluntary floating indebtedness shall not exceed $2,500.00; nor its bonded indebtedness, $5,000.00 at any one time. . . ."

Bandon Charter, Art IX, sec 34 (1940):

It should be understood that the meaning of a charter debt limitation, as the meaning of any other charter provision, is an individual matter for each city. The adoption of a debt limitation, by charter or otherwise, is local legislation, to be

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"Unless otherwise authorized by the legal voters of the City of Bandon at a special election duly called and held for such purpose, the council shall not contract a voluntary floating indebtedness of said city in excess of the sum of $500.00 for general city purposes and the council shall not contract an indebtedness in excess of the sum of $1,500.00 for the maintenance and operation of its municipal utilities; no warrants shall be authorized by the council, nor be issued unless there is cash in the city treasury available for the payment of such warrant.

"Members of the city council, or any other city official or public employee, who shall authorize, incur, cause or create, or officially approve any such indebtedness in excess of said limitation, shall be jointly and severally liable, individually and personally, for the amount of such excess."

(This section was removed when the City of Bandon amended its charter in 1981.)

The charters of the cities of Drain, McMinnville, Cascade Locks and Canby also state:

"All city officials and employees who create or officially approve any indebtedness in excess of this limitation shall be jointly and severally liable for the excess."

Charters of the cities of Drain and Cascade Locks also provide:

"For purposes of calculating the limitation, however, the legally authorized debt of the city at the time this charter takes effect shall not be considered."

The McMinnville Charter contains the same provision, without the language "at the time this charter takes effect."

Under the Canby and McMinnville charters, the ordinary charter debt limitations do not apply, respectively, to revenue bonds of the Canby Utility Board and to warrants of McMinnville Water and Light Commission. Instead, the Canby Utility Board's authority to "borrow money" for up to five years is limited to a stated percentage of revenue or plant value, Canby Charter ch XIII, §4(1). Similarly, the Springfield Utility Board's power "to borrow money either by the issuance of notes or bonds secured only by a pledge of [utility] revenues" is limited to 25 percent of the utility's original cost and to stated purposes. By their terms these provisions do not apply here, once the argument that the participants are the "borrowers" under bonds issued by WPPSS is rejected.

interpreted by the same means as other legislation, including attention to the meaning intended by those who adopted it if that can be ascertained. It is not a matter of common law, to be resolved by consulting caselaw or encyclopedic summaries of caselaw. *Cf. Anderson v. Peden,* 284 Or. 313, 315-316, 587 P.2d 59 (1978) (concerning the meaning of "conditional use" in zoning ordinances). A city can write its charter or ordinance to define for itself the amount, character, or purposes of indebtedness that it means to limit. Not only can cities choose different words; legislative history may show that cities, like state legislatures, meant different things by the same words.

It therefore is not conclusive that cases have held indebtedness under various charter provisions to include long-term contracts or to exclude obligations payable from "special funds." In the absence of statute, a city can design its debt limitation to exclude payments due for goods and services as distinct from borrowed money, or to include debts payable from non-tax revenues.[10] Under the "home rule" powers of Article XI, section 2 of the Oregon Constitution, these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines.

This does not mean that past judicial opinions are irrelevant in interpreting a particular provision. Given the ingrained tendency to copy conventional texts, though obscure, rather than seek clarity by new ones, charter debt limitations may well have been adopted and later repeated in the belief that they meant whatever courts or McQuillin had said of such provisions generally.[11] As early as 1873, for instance, this court held that a 17-year contract to purchase water at a fixed rate created an immediate indebtedness for the total, aggregate purchase price. *Salem Water Co. v. City of Salem,* 5. Or. 29 (1873), *see also Brewster v. Deschutes County,* 137 Or. 100, 1 P.2d 607 (1931). The assumption that present charter provisions accept that

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[10] *See* ORS 287.004, *supra* n. 12.

[11] *See* 5 McQuillin § 2232 (1913, 1st ed) stating that long-term contracts are debt and 5 McQuillin § 2228 (1913, 1st ed) (payments from "special funds" are not debt).

interpretation of indebtedness might be overcome by showing a different intention, but no such showing has been attempted in this case. WPPSS invites us to reconsider this "aggregation rule," citing a reference to that possibility in *Terry v. Multnomah County,* 279 Or. 127, 136, 138, 566 P.2d 878 (1977). But, as already stated, that view of long-term contracts is not properly a judicial rule but judicial interpretation of state or local laws, and it can be modified at will by amending the laws.

For present purposes we accept the opponents' assertion that the cities' financial commitments to WPPSS would qualify as indebtedness within these cities' respective charters if they were payable from general funds. The question is whether the charter limitations exclude debts payable only from electric utility revenues under the interpretation of debt limitations generally known as the "special fund doctrine."

We note that this "doctrine," too, is not a judicial rule of law but judicial interpretation of provisions found in various statutes, charters, and the constitution. Again, however, it is an interpretation that early was recognized in Oregon, *see, e.g., Brockway v. Roseburg,* 46 Or. 77, 79 P.355 (1905), *Eaton v. Mimnaugh* 43 Or. 465, 73 P.754 (1903), *Avery v. Job,* 25 Or. 512, 36 P.293 (1894), and we are offered no evidence that any of the provisions relied upon in this case were differently intended or in practice have been thought to include debts payable from non-tax revenues.

The proponents rely on this court's statements of the doctrine in *Butler v. City of Ashland,* 113 Or. 174, 232 P.655 (1925), which involved a city's contract to buy water from an irrigation district. The city expected to pay for the water by issuing notes exceeding the amount of debt allowed by its charter, and the contract originally was made contingent on approval of a charter amendment by the voters. When the city found that it could meet the cost from accumulated and expected revenues from the sale of water, the contract was changed to substitute "certificates of indebtedness" payable exclusively from those revenues, and no authorizing election was held. The court declined to enjoin issuance of the

certificates of indebtedness as a violation of the charter. It wrote:

> "The authorities are well-nigh unanimous, that where a contract creating an indebtedness provides for a special fund with which to meet the indebtedness as the same accrues, and no general liability is thereby created against the municipality, such an indebtedness is not within the constitutional inhibition against creating a debt in excess of a fixed amount. . . ."[12]

> "The language of the special obligation note limits the liability of the city to the water revenues. The special obligation notes, therefore, do not constitute an indebtedness against the city within the meaning of Article XI, Section 5, of the Constitution of Oregon."

113 Or. at 182-183.

Subsequent decisions have repeated this view of debt limitations, making their application turn on the potential exposure of general tax revenues. *Compare, e.g., Walsh Const. Co. v. Smith*, 272 Or. 398, 404, 537 P.2d 542 (1975) (housing bonds payable from rents held to be outside debt limitation despite a "moral make-up clause"); *Morris v. City of Salem*, 179 Or. 666, 174 P.2d 192 (1946) (same for contract to purchase parking meters payable only from meter revenues), *McClain v. Regents of the University, supra*, (same for dormitory bonds payable only from rental income), with *Public Market Co. v. City of Portland*, 171 Or. 522, 130 P.2d 624, 138 P.2d 916 (1943) (lack of revenue source to repay "utility certificates" would violate debt limitation), *Rorick v. Dailes*

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[12] The court cited 5 McQuillin, Municipal Corporations, §§ 2227, 2228, and 2230, and the following cases as having approved the principles stated in those sections: *Morris v. City of Sheridan*, 86 Or. 224, 233, 167 p. 593 (1946); *Smith v. Jefferson*, 75 Or. 179, 146 P. 809 (1915); *City of Joseph v. Joseph Water Works Co.*, 57 Or. 586, 111 P. 864, 112 P. 1083 (1910); *Kadderly v. Portland*, 44 Or. 118, 151, 74 P. 710, 75 P. 222 (1903); *Little v. City of Portland*, 26 Or. 235, 246, 37 P. 911 (1894).

City, 140 Or. 342, 12 P.2d 762 (1932) (held to be within the debt limitation because of partial exposure of general funds beyond tolls collected from toll bridge).

We repeat that the exposure of tax revenues is not an inescapable definition of indebtedness. A public entity's financial obligations payable from its operating assets, like those in *Butler* or in the other cases cited above, may have all the ordinary characteristics of debt of a private entity engaged in a similar operation, and charters or other laws may choose how such debt should be incurred or restricted. The uniform interpretation given existing laws, however, is of long standing. The cities and their ratepayers do not claim that the special fund doctrine, as previously understood in Oregon, does not apply to their respective cities, but they claim that it does not apply to the obligations imposed by the Participants' Agreements.

They seek to distinguish the decisions applying the doctrine by arguing that none of those decisions involved obligations with all the features of the present agreements. They observe that the cities' financial obligations towards WPPSS are not for projects owned or controlled by the cities, do not depend on actual receipt of any benefit (in this case electricity), are not self-liquidating, are not finite in amount or in the rates committed to paying them, and obligate revenues that are paid by substantially all residents for an essential service. They maintain that these characteristics should take the contracts beyond the limits of the "special fund" exception. The proponents respond that characteristics which individually do not create a debt under the charters also cannot cumulate so as to create a debt.

None of the listed characteristics places a transaction outside the "special fund" rule. This court's older decisions did not confine that concept to self-liquidating projects but used the term also to refer to assessments levied for specific projects that generated no revenue, such as a courthouse, *Dougan Co. v. Klamath County*, 99 Or. 436, 193 P.645 (1920), a jail, *Wingate v. Clatsop County*, 71 Or. 94, 142 P.561 (1914), and roads and

streets. *Morris v. City of Sheridan,* 86 Or. 224, 167 P.593 (1917), *Bowers v. Neil,* 64 Or. 104, 128 P.433 (1912), *Kadderly v. Portland,* 44 Or. 118, 74 P.710, 75 P.222 (1903), *Little v. City of Portland,* 26 Or. 235, 246, 37 P.911 (1894). Also, the persons who provide the "special fund" need not be direct beneficiaries of the expenditure; indeed, there need not be any quid pro quo. In *Moses v. Meier,* 148 Or. 185, 35 P.2d 981 (1934), the court applied the doctrine to an unemployment relief fund payable from liquor control revenues. The opponents observe that *Moses v. Meier* was litigated as a "friendly" proceeding and perhaps turned on the court's desire to uphold the laudable purpose for which the liquor control funds were exacted in the first place. Nonetheless, the source of the funds, not the purpose to which they were put, explains the decision that they escaped the constitutional restriction on state debt.

Against the position emerging from these cases, opponents argue forcefully that a debt limitation confined to commitments of tax revenues cannot prevent state or local officials from entering speculative or ill-considered undertakings without the prior consent of their constituents. That is true; in hindsight, the present contracts are an example. The law of debt limitations in general and the special fund doctrine in particular have had their share of criticism; upon a fresh start in the light of experience one might draw the lines differently. But the argument presents a task for lawmakers; it comes too late for judges. As recently as 1976, Justice Holman's opinion in *Martin v. Oregon Building Authority supra,* reiterated that the predominant purpose of debt limitations was to forestall irresponsibly imposed tax burdens, to protect against "burdensome and excessive taxation," *McClain v. Regents of the University,* 124 Or. at 634, to "prevent exposing the sources of public revenue to potential hazard," *Carruthers v. Port of Astoria,* 249 Or. 329, 337, 438 P.2d 725 (1968),[13] and to preserve "the ability of future legislatures to avoid a tax increase." 276 Or. at 135. Too many commitments have been made on that understanding to overturn it now, in the absence

[13] "Public revenue," in the *Carruthers* opinion, referred to tax revenue.

of a showing that a particular law or charter provision meant something else. And the interpretation of debt limitations as referring to commitments of tax revenues is defensible. It is not unreasonable to suppose that a community might wish to impose quantitative or procedural restraints on the perennial political urge to spend the next generation's taxes, yet not wish to extend the same restraints to the management of its public service enterprises as long as tax revenues are not obligated.

We do not accept the opponents' argument that utility rates in fact are equivalent to taxes because they have a comparable economic impact on ratepayers. Any charge for a public service reduces the user's disposable funds much as taxes do; that was true of the water charges in *Butler*, the dormitory rents in *McClain*, the bridge tolls in *Rorick*, and the parking meters in *Morris*, each of which was a necessity for some class of users. Charges for these necessities are not inescapable in the same sense as taxes are. This is what makes general obligation debt preferable to creditors, and correspondingly cheaper. At some point it may become too expensive to drive or park a car, to attend a college, to water a lawn; and it also is possible to reduce one's consumption of electricity, to substitute another fuel, or in the case of a plant or institution, perhaps even to generate one's own electricity. If an unforeseen event prices too many users out of the market for the service, the creditor also loses the only source of repayment. In equating a commitment of future rates, expensive as it may prove to be, to a pledge of future taxes, the opponents simply attack the "special fund" premise of this long-established line of decisions in another way.

Nor, finally, do we agree with the contention that the Participants' Agreements in fact expose the cities to general liability. The agreements plainly were intended to exclude any obligation that would bring them within the various debt limitations. That was understood to be essential to their validity, and they must be interpreted accordingly. *Public Market Co. v. Portland*, 171 Or. at 565, 130 P.2d 624, 171 Or. 523, 138 P.2d 916. The agreements expressly negate any

obligation to pay except from the revenues derived from the ownership and operation of a participant's electric utility properties. The exclusion of any broader liability deserves to be taken at face value. *See Carruthers v. Port of Astoria, supra,* 249 Or. at 339-340, 438 P.2d 725.

VI. PROHIBITION OF "STOCKHOLDER" OR "LOANING CREDIT"

The preceding sections have discussed bonding procedures and debt limitations that could be satisfied, if necessary, by putting the intended commitment to the WPPSS projects to a vote of the respective participants' voters. Beyond those issues, the opponents also invoke constitutional limitations which could not be so satisfied but would prevent the cities and districts from entering into these transactions altogether.

Article XI, section 9 or the Oregon Constitution provides:

> "No county, city, town or other municipal corporation, by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association. . . ."[14]

The opponents contend that the participants became "stockholders" in WPPSS and in WNP 4 and 5, that they "raised money" for WPPSS and the projects, that they "loaned their credit" to WPPSS as the security for its bonds, and that, however characterized, the effect of the financing scheme was to create the kind of risks that the constitutional provision was designed to prevent. The proponents respond that WPPSS has no "stock," that the constitutional clause only applies to funds

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[14] The section continues with a proviso adopted in 1917 to allow ports to offer a bonus in aid of water transportation.

Districts are municipal corporations. *In re People's Utility District,* 160 Or. 530, 86 P.2d 460 (1939). The PUDs' brief in this case adopts the arguments of the ratepayers and cities under Art XI, § 9.

invested in or raised for private enterprises, and that, again, it applies only to the use of general tax revenues. Each side relies on passages from past opinions discussing the scope of Article XI, section 9. The proponents quote statements that the clause is directed at using public funds in aid of private corporations, as said in *Carruthers v. Port of Astoria, supra,* 249 Or. at 340, 438 P.2d 725 and *Johnson v. School District No. 1,* 128 Or. 9, 12, 270 Or. 764, 273 P. 386 (1929). *See also Sprague v. Straub,* 252 Or. 507, 511-518, 451 P.2d 49 (1969) (discussing parallel prohibition of article XI, section 6). The opponents quote from the same opinions statements that the targets of the section were "speculation" (*Johnson*) and a "potential hazard" to public revenues, *Carruthers v. Port of Astoria, supra,* at 329, 438 P.2d 725.

These statements, of course, are not inconsistent. No doubt those who drafted the prohibitions had in mind the practice of aiding private enterprise, and the quoted statements were made in that context; the cases did not have to consider speculative investments in securities of enterprises that might not be "private."

The opponents make a good textual argument for the position that the word "corporation," as used in Article XI, was not confined to today's business corporation but included public as well as private corporate entities, and that the phrase "any joint company, corporation or association, whatever" in section nine encompasses an entity such as WPPSS.[15] We also may assume for this argument that the term "stockholder" does not allow evasion by substituting another word to describe a financial investment in such an entity that is neither repayable

[15] The creation and powers of corporations and the liability of their shareholders were controversial topics in the 1857 constitutional convention. They were coupled, significantly enough, with the topic of "internal improvements," meaning economic development. *See* Carey, The Oregon Constitution 147, 232-278. Or. Const. Art. XI, § 2, which provided that "[c]orporations may be formed under general laws, but shall not be created by specific laws, except for municipal purposes," shows the 19th century usage of "corporation" to include municipal as well as business or other private entities.

as a debt nor part ownership of identifiable property. The hypothesis distinguishes the transactions sustained in *Churchill v. Grants Pass*, 70 Or. 283, 141 P.164 (1914) (agreement to build a railroad for lease or sale to private company), and *Security Co. v. Baker*, 39 Or. 396, 65 P.369 (1901) (common ownership of real property with private company). Even on these assumptions, the Participants' Agreement did not make the participants "stockholders" in WPPSS, a statutory entity composed of Washington cities and public utility districts. Nor are we persuaded that the 88 participants themselves formed an "association" in which they held "stock" within the meaning of Article XI, section 9.

Equally unconvincing is the argument that the participants "raised money" for WPPSS; if anything, WPPSS, by selling its revenue bonds, raised money intended to benefit the participants. Of the several prohibitions combined in Article XI, section 9 of the Oregon Constitution, the opponents' most plausible claim is that WPPSS was able to sell its bonds only on the strength of the participants' "loan" of "credit" in the form of their unconditional promises to pay the bills.

Past opinions discussing these constitutional provisions include some cases in which the government became a co-owner of property or borrowed funds to aid a private enterprise in a desired economic development. *See Miles v. City of Eugene*, 252 Or. 528, 451 P.2d 59 (1969) (joint construction of power plant); *Carruthers v. Port of Astoria, supra* (municipal financing of aluminum reduction plant for long-term lease to specified private company); *Hunter v. Roseburg*, 80 Or. 588, 156 P. 267, 157 P. 1065 (1916) (municipal bonds for joint railroad project with railroad company and lumber company). These more properly illustrate "raising money" than "lending credit." By forbidding the state to "lend" and local governments to "loan" their credit, as well as to hold stock in or raise money for a corporation, Article XI covers transactions in which government does not itself raise and transfer funds but places its credit behind the corporation's ability to borrow money or obtain goods on credit. The obvious example is an outright

guarantee made directly to a creditor to pay another's debt. Although the Participants' Agreements with WPPSS are not literally guarantees to the bondholders, the opponents argue that they are the functional equivalent and should be treated as such.

Indisputably WPPSS undertook and was able to sell bonds and begin construction on the strength of the participants' commitments to pay the bills sent by WPPSS as they came due. The transactions were built around those commitments. That might be true of any private project undertaken to satisfy a specific governmental demand and financed on the basis of a long-term lease or contract, at a price tied to the supplier's costs. What makes these agreements into a loan of credit rather than a purchase contract, according to the opponents, is that the participants assumed the "dry hole" risk in section 6(c), *supra* n. 2, which committed them unconditionally to pay all that WPPSS would borrow and spend without assurance of receiving anything in return.

Although this seems to state a plausible distinction between a cost-based purchase contract and a loan of credit, on examination it proves to be doubtful. The argument implies that the agreements would be valid as long as they were contingent upon the delivery of some electricity to the participants, at whatever cost. It is not obvious why the legal character of the transaction should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none. In either event WPPSS would have obtained the necessary funds upon the assurance of the participants' obligations to pay.

But we need not decide whether an unconditional agreement to pay the costs of a speculative source of supply ("project capability") would constitutionally differ from an agreement to buy an unspecified quantity of electric power priced at equally speculative costs, if the agreement involved a general obligation to pay from public funds. This court's past interpretation of Article XI, section 9, as of the other debt limitations, once again has confined the prohibition against loans of credit to those

which expose the government's general credit, that is to say, its taxing power. Thus *Miles v. City of Eugene*, 252 Or. at 531, 451 P.2d 59 cited *McLain, Moses*, and *Carruthers* for the proposition that the "loan of credit" clause "is not a restriction upon the obtaining of funds by a municipality by the sale of revenue bonds, as distinguished from general obligation bonds." The court explained *Carruthers v. Port of Astoria, supra*, as follows:

> "In that case the Port proposed to raise funds by the sale of revenue bonds. With the funds the Port was going to build an aluminum reduction plant, lease it to a private company, and grant the private company an option to purchase the plant at the end of 25 years for a nominal balance. We held that this did not amount to raising money for a private business or loaning credit to, or in aid of, the private company. Likewise, the proposal in this case would not come within the constitutional prohibition against raising money or loaning credit. Money coming from revenue bonds and not from tax money does not fall within the prohibition."

252 Or. at 533-534, 451 P.2d 59. And the *Miles* opinion concluded, at 537, 451 P.2d 59:

> "In this case and in *Carruthers v. Port of Astoria*, supra (249 Or. 329, 438 P.2d 725), the parties attacking the constitutionality of the proposals relied strongly upon *Hunter v. Roseburg*, 80 Or. 588, 156 P.267, 157 P.1065 (1916). That case is distinguishable because in that case the city was proposing to finance the construction of a railroad with general obligation bonds payable from general tax levies."

It may well be that the ban on stockholding, raising money for, or lending credit to corporations aimed to bar favoritism, corruption or other misuse of political institutions to aid particular private enterprises as well as to protect public finances against speculation. Private use of government credit is not the issue in financial transactions among governmental entities like the cities, the districts, and WPPSS. And even if the aim to protect public finances should cover speculative commitments to enterprises whose "private" or "public" character may be

doubtful, the foregoing cases have defined the protected funds to be only tax revenues.

When government engages in public services or activities that generate revenues other than taxes, this court's past decisions have let government commit those revenues to financing its own projects or to support desired private projects, though of course it remains in the power of state and local lawmakers to provide otherwise. These judicial decisions often were obtained before the actual execution of financing schemes that the communities concerned deemed desirable, as in *Miles* and *Carruthers, supra.* The law there pronounced cannot be disregarded or overturned because a set of commitments made in reliance thereon has come to grief.

VII. CITY AUTHORITY

The ratepayers and four municipalities, Bandon, Cascade Locks, Drain, and the Canby Utility Board, contend that the cities had no authority by charter or by statute to enter into the Participants' Agreements. The cities of Springfield, McMinnville and Milton-Freewater, along with WPPSS, defend their authority to do so. The trial court held as a conclusion of law that "Municipal Participants do not have charter authority, either express or implied, to enter into the Participant's Agreement." More specifically, the court concluded that the agreements were a "guaranty" and a "pledge of systems revenues" to secure the obligations of WPPSS, and it held the agreements ultra vires because "Municipal Participants do not have statutory or charter authority to enter into such guaranty, security relationship or pledge, nor do they have statutory or charter authority to exercise extramural powers."

As stated earlier, it is inaccurate to treat the law of the cities' charter powers collectively rather than individually. To paraphrase what we said of debt limitations, the definition of charter powers is an individual matter for each city, a form of local legislation to be interpreted by the same means as any other legislation, including attention to the intent and purpose

of those who adopted it. The briefs devote much space and attention to quotations from past opinions, which in turn quoted treatises quoting case law, on "strict" or "liberal" construction of charter powers. But such supposed judical "rules of construction," though fairly quoted, are of limited utility in interpreting a particular city charter.

Again, charter authority "is not a matter of common law, to be resolved by consulting case law or encyclopedic summaries of case law." *Supra,* pp. 1329-1330. Adoption of a charter is a political act of a particular community at a particular time. A court's decision that one city did not have authority to undertake a project does not decide whether another city has such authority, or the same city at another time. A city can write or amend its charter or ordinance to define for itself what functions and services it wants its agencies to perform, consistent with statutes and the constitution. Within those constraints, a city may empower its government to operate utilities, including the distribution or the generation of electricity, or it may deny or limit that power. An earlier case involving the sale of electric power by one of the present parties, for instance, hinged on a provision of the McMinnville city charter that allowed it to sell such power to citizens of the city "and vicinity." *Yamhill Elec. Co. v. City of McMinnville,* 130 Or. 309, 274 P. 118, 280 P. 504 (1929). A charter also may specify whether it means to authorize only acts expressly mentioned, or others implied in order to achieve wider objectives, or perhaps specify different principles depending upon the function. In fact, the charters of several cities in this case contain directives that they be "liberally construed." To repeat, under home rule these are political choices for the cities; they will not be imposed by courts in the name of judicial doctrines. The court can only try to determine what political choice is expressed or implied in the charter or other source of authority.

Each of the cities here has charter provisions pertinent to the purchase of electricity. The Canby, McMinnville, and Springfield charters create separate utility boards or commissions. In the case of the Springfield Utility Board, whose

authority is disputed by the Springfield ratepayers, the charter authorizes the board to act for the city "in connection with all matters relating to the management, operation, acquisition, and financing of all electric . . . properties now owned or hereafter acquired by the city of Springfield." The "properties" referred to may be either generating or distributing facilities. It is unnecessary to construe the "properties" as including electricity, because actions taken to secure a future supply of electric power plainly relate to the management and operation of a distributing system.

Some of the other cities may have undertaken to distribute electricity under older terminology authorizing them to provide street lighting or "furnishing their inhabitants with gas or other lights," or under more general authority to provide services for their citizens. Their authority to provide electric utility service has long gone unchallenged and is not challenged here. The opponents do not put in issue any of the cities' authority to provide electric service and to obtain the necessary electric power from others. Understandably, none of the cities themselves nor the ratepayers argue that any of the respective charters do not permit the city to operate an electric utility system, to acquire electric power from distant suppliers, or to secure such supplies by long term contracts. They deny only that the authority to contract for future supplies of power extends so far as to enter into the Participants' Agreements used in this instance.

One of the arguments made by the opponents and accepted by the circuit court is that the agreements involve an "extramural" exercise of municipal power for which cities need authority from the state as well as from their own charters. They cite cases of an earlier generation that recited this rule in general terms, although the decisions rarely invalidated the particular activity in issue. *See, e.g., City of Salem v. O.-W. Water Serv. Co.,* 144 Or. 93, 23 P.2d 539 (1933) (sale of city water outside the city authorized by law and charter); *Yamhill Elec. Co. v. City of McMinnville, supra,* 130 Or. 309, 274 P. 118 (1929) (same for sale of electricity); *State v. Port of Astoria,* 79

Or. 1, 154 P. 399 (1916) (sustaining legislation for operations of port). *Richards v. City of Portland,* 121 Or. 340, 255 P. 326 (1927), denied the city's power to sell water beyond its boundaries, but that was in defense against a claim of nonresident plaintiffs that the city was bound to sell them water, and in *Yamhill Elec. Co. v. City of McMinnville, supra,* two years later the court said that "all expressions in the opinion in that case must be construed with reference to the issue there being tried." 130 Or. at 340, 274 P. 118.

A broad generalization that a city has no "power" or "authority" beyond its borders does little to explain what constitutes an exercise of "power" or "authority." It does not explain, for instance, why these terms apply to a city's sales of goods or services outside its borders more than to its purchases. Nor is it always clear whose interests the rule is meant to protect, that of the citizens who have authorized the city's action or that of the surrounding governmental entities and their inhabitants. Possibly the early opinions reflect concern about competitive encroachments by municipal enterprises or private business more than legal analysis. *See, e.g., Yamhill Elec. Co., supra.* Perhaps also the installation of permanent city facilities, even if accomplished by ordinary "proprietary" transactions, may sometimes represent an extension of the city's presence beyond its borders that should be authorized by the state rather than only the city's own citizens. *See, e.g., Riggs v Grants Pass,* 66 Or. 266, 134 P. 776 (1913). Primarily, however, the concept of "extramural power," power "outside the walls," is relevant when a city undertakes to assert coercive authority over persons or property outside its boundaries. It has little relevance to a city's contracts or other consensual transactions in goods or services, although an exercise of eminent domain outside city limits, for instance—would be an exercise of extramural power.

The opponents attack as "extramural authority" the provisions of the agreement that afford the participants certain privileges in supervising the construction and operation of the projects by means of a Participants' Committee. Without

setting out these provisions here, we agree that they would be a significant exercise of authority if a city attempted to impose them upon any enterprise not its own. In such a case the location of the projects outside the city could be significant. But the cities did not impose these provisions on WPPSS as an exercise of municipal power. Rather, their inclusion in the agreement between WPPSS and the participants clearly was a safeguard designed to give the participants a means to protect their interests in the success and the cost of the new source of power that WPPSS was contracting to provide for them. If the agreements survive the other attacks made upon them, the cities needed no additional authorization to share this protective function merely because the projects would be built outside their boundaries.

The circuit court also concluded that the agreements constituted an unauthorized "guarantee" of debts incurred by WPPSS, which were "secured" by a "pledge" of the municipal utility systems' revenues. We do not agree.

In Part VI above, we discussed essentially the same characterization of the agreement in rejecting the contention that the agreements were a forbidden "loan of credit" to WPPSS. There we noted that any long-term contract to buy a supplier's unspecified output at a price tied to the supplier's cost might serve as the economic basis for financing the supplier's purchase or construction of the requisite facility, and that the opponents distinguished the present agreement from such a contract only because the participants unconditionally obligated themselves to pay their share of those costs even if WPPSS was unable to deliver any power in return. We were not persuaded that the legal character of the transaction (as a purchase contract or a "loan of credit") should differ if the power plants were completed at great cost but produced only a small fraction of the expected electricity rather than none.

A legal distinction between a little electricity and none is even less apparent when the issue is charter authority, because here we deal with grants of power to responsible city officials rather than the meaning of a limiting term such as a "loan of credit." If a city may commit itself to purchase at cost whatever

a supplier using its best efforts can produce from facilities which will be financed in reliance on the city's contract, however small the production and however expensive the product turns out to be, then we see no reason why this authority stops at contracting to pay the costs if small and costly deliveries should turn out to be none at all.

These agreements proved unwise in retrospect, and with the benefit of hindsight they may appear to have been unwise when made. But that is no reason to find them unauthorized. When a city has authority to provide electric power or other public services, that authority cannot well be construed to permit wise but to exclude unwise contracts. A long-term commitment to pay the cost of a needed source of supply could prove to be a financial calamity in many imaginable situations. A city might contract to assure itself of a supply of oil in a period of shortages and high prices only to have the market price collapse in a subsequent oil glut. (Conversely, if McMinnville in the *Yamhil Electric Co.* case, *supra*, had made a firm contract to sell power it considered surplus, it later might have found itself having to pay far higher market price to replace it.) A city college might enter a long-term lease in order to have an apartment building converted to a dormitory for which there turns out to be no student demand. A desert city in need of a water supply might contract with some other entity to cover the costs of drilling wells in search of such a supply irrespective how little water was found. In the first example the price is excessive, the second acquisition proves superfluous, and the third may produce nothing in return for the money, but with respect to the issue of the cities' authority they are the same in principle. What distinguisnes the present case is only the magnitude of the sums involved.

A separate question remains whether the cities gave an unauthorized guarantee of the obligations, not of WPPSS, but of their fellow participants, when their unconditional obligation to pay regardless of deliveries is coupled with their agreement to pick up the shares of defaulting participants up to 25 percent of each participant's original share. We return to that question below.

VIII. THE PEOPLE'S UTILITY DISTRICTS.

Like the cities, the people's utility districts claim that they acted ultra vires, that is to say, exceeded their authority, in entering the Participants' Agreements. Of course, the PUDs' authority does not depend on individual charters, and there can be no question of their broad authority to enter into transactions appropriate to the operations of an electric utility; that is their function. Rather, the PUD's contentions, like the cities', also turn on characterizing the agreements as assuming debts or guarantees and not as power purchases.

The law governing PUDs is found both in the constitution and in statutes. Article XI, section 12, of the Oregon Constitution, adopted by means of an initiative in 1930, specified certain purposes and powers of such districts and directed the Legislative Assembly to provide any necessary legislation to carry out the provisions of the constitutional amendment.[16] That legislation is found in ORS chapter 261.

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[16] Or. Const. Art. XI, § 12:

> "Peoples' Utility Districts may be created of territory, contiguous or otherwise, within one or more counties, and may consist of an incorporated municipality, or municipalities, with or without unincorporated territory, for the purpose of supplying water for domestic and municipal purposes; for the development of water power and/or electric energy; and for the distribution, disposal and sale of water, water power and electric energy. Such districts shall be managed by boards of directors, consisting of five members, who shall be residents of such districts. Such districts shall have power:
>
> "(a) To call and hold elections within their respective districts.
>
> "(b) To levy taxes upon the taxable property of such districts.
>
> "(c) To issue, sell and assume evidences of indebtedness.
>
> "(d) To enter into contracts.
>
> "(e) To exercise the power of eminent domain.
>
> "(f) To acquire and hold real and other property necessary or incident to the business of such districts.

The constitution includes among the authorized purposes "the development of water power and/or electric energy" as well as its distribution and sale. It empowers the districts to levy property taxes, to issue, sell and assume bonds or other debt, to make contracts, to acquire property necessary or incident to the PUDs business, and to acquire, develop, or otherwise provide for electric energy for distribution both within and outside their territories. These powers are spelled out in greater detail in ORS 261.305—261.390.

As discussed in Part III of this opinion, additional provisions enacted in 1967 address the participation of PUDs in jointly owned power generating facilities. ORS 161.235—261.255. A district also may join in the formation of a "joint operating agency" for the generation and transmission of electric energy under ORS chapter 262. The districts did not use the procedures of these statutes in entering their agreements with WPPSS.

The crux of the PUDs' claim that their participation was ultra vires is that the Participants' Agreements created a form of debt that a PUD may incur only after obtaining approval of its qualified voters. ORS 261.305(6) requires such a vote for issuing revenue or general obligation bonds by procedures further specified in ORS 261.355—261.375.[17] WPPSS responds

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"(g) To acquire, develop, and/or otherwise provide for a supply of water, water power and electric energy.

"Such districts may sell, distribute and/or otherwise dispose of water, water power and electric energy within or without the territory of such districts."

Although this provision uses the spelling "Peoples'," the statutes use "people's." We follow the statutory spelling as more grammatical.

[17] ORS 261.305(6):

"To borrow money and incur indebtedness; to issue, sell and assume evidences of indebtedness; to refund and retire any indebtedness that may exist against or be assumed by the district or that may exist against the revenues of the district and to pledge any part of its revenues. Except as provided in ORS 261.380, no revenue or general obligation bonds shall be issued or sold without the approval of the qualified voters. The board of directors may borrow from

that the PUDs did not issue bonds but only entered into a long-term contract to buy a share of whatever power WNP 4 and WNP 5 might be capable of delivering, at a price based on the cost of that capability.

The PUDs concede that they did not issue bonds; WPPSS did. They argue, however, that the Participants' Agreements shared such essential characteristics of revenue bonds that they were "identical in substance" to issuing such bonds. The characteristics referred to are that the PUDs obligated themselves to pay a proportionate share of all costs of the projects, including debt service and termination costs, that they would set their own rates high enough to produce the needed revenue, and that the obligation was unconditional, whether or not the projects produced any power or WPPSS breached the agreements. Because the same obligations are typical of revenue bond financing by the PUDs themselves, and because WPPSS offered its prospective bondholders no source of repayment other than these contractual obligations of the participants, the PUDs describe WPPSS and its bonds as a mere "conduit" for financing the projects with revenues "pledged" by the participants, relying essentially on the precedent of *Martin v. Oregon Building Authority*, 276 Or. 135, 554 P.2d 126 (1976).

We have reviewed and rejected that analysis in Part IV, above. But the PUDs also point to the sentence in ORS

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banks or other financial institutions, on notes payable within 12 months, such sums as the board of directors deems necessary or advisable; however, the amounts so borrowed, together with the principal amounts of other like borrowings then outstanding and unpaid, shall not exceed the amount which the board of directors estimates as the district's net income (determined in accordance with the system of accounts maintained by the board pursuant to ORS 261.470) for the 12 full calendar months following the date of the proposed borrowing, adjusted by adding to the net income an amount equal to the estimated charges to depreciation for the 12-month period. No indebtedness shall be incurred or assumed except on account of the development, purchase and operation of a utility."

261.305(6), *supra,* that allows the directors to borrow from banks and financial institutions "on notes payable within 12 months" no more than the district's estimated net income for the 12 months following the "borrowing." The PUDs contend that this sentence limits their authority to "incur indebtedness" toward other than "banks or financial institutions," if it is not to have a loophole fatal to the apparent legislative purpose. They argue that if the restriction of ORS 261.305(6) applied only to banks or financial institutions, nothing would limit a PUD's authority to "borrow from General Motors, the Fred Meyer Trust, an Arab sheik or any other person with money to loan."

We may agree with the argument that the statutory limitation might apply to borrowing from any lender, whether or not it is primarily a bank or "financial institution" in the ordinary usage of those terms. But we need not decide this here, because we do not find any borrowing by the PUDs in this case.

The PUDs' brief quotes passages from *Fullerton v. Central Lincoln Utility Dist.,* 185 Or. 28, 201 P.2d 524 (1948), to the effect that the purpose of limiting the amount of borrowing without prior approval of the voters was "to require the directors to conduct the affairs of the district upon a pay-as-you-go basis," to require them "to carry on their corporate operations upon a cash basis," and "to put a brake upon the runaway enthusiasm of the directors." 185 Or. at 36-37, 44, 201 P.2d 524. The first two passages actually quoted books speaking generally about requirements for borrowing, not words of this court interpreting ORS 261.305(6), but they may state the general purpose of such requirements well enough. They were pertinent to *Fullerton,* which was a borrowing case. In *Fullerton,* the district actually issued revenue bonds, claiming that no prior approval by the voters was needed because the amount of the bonds did not exceed "the ordinary annual income and revenue of the district." The issue was whether these words in what is now ORS 261.305(6) meant gross revenue or net revenue, and the court held that they meant the district's "ordinary net annual income" for the year in question.

185 Or. at 38, 201 P.2d 524. But *Fullerton* did not deal with purchases. It did not hold that a PUD might not commit itself to a long-term power supply contract because the total commitment exceeds one year's net income, as long as such income covers the payments due during the year. We decline to hold so now.

For the reasons stated in Part VII with respect to the cities, the PUDs did not enter into an unauthorized "guarantee" of the bonds issued by WPPSS, as distinct from the question whether they guaranteed the obligations of their fellow participants, discussed below.

IX. OTHER ISSUES

A. Delegation.

The opponents contend that the participants' covenant to maintain electric rates adequate to meet payments due under the agreement, *supra,* n.2, unlawfully binds the future leadership of the cities or districts or unlawfully delegates their ratemaking authority. In the interest of not further lengthening this opinion, we do not review and distinguish the opinions quoted for the limits on elected officials in this respect. The short answer is that if the cities and PUDs, in managing their electric utilities, have the authority to make long-term financial commitments payable exclusively from future electric revenues, they also have authority to promise that the revenues will be maintained at a level adequate to meet the commitments. Otherwise a contractual obligation limited to such revenues could be avoided simply by setting rates too low to meet it, which means that in practice it could not be negotiated at all, or that the contract would have to be executed as a general obligation to be paid from other sources, including taxes, with all the legal consequences of such an obligation. The opponents in fact concede that a city may enter into a rate covenant when authorized by statute, without offering a reasoned explanation why a statute could overcome what purports to be a fundamental principal of governmental responsibility.

The Participants' Agreement does not set specified electric rates for any participant. It does not let WPPSS set the rates. The titles and PUDs retain responsibility for determining their rate schedules with respect to classes of service, classes of customers, minimum amounts, or whatever otherwise permissible variables they choose. They promised only to collect revenues adequate to cover their contractual obligations. That is not an unlawful delegation of power if the contractual obligations themselves are within their authority. These contentions therefore stand and fall with the opponents' challenge to the cities' and PUDs' authority to make the underlying contract.

B. Public Policy.

The PUDs argue, and the circuit court held, that the Participants' Agreement contravened the public policy expressed in the laws governing the PUDs' operations, ORS chapters 261 and 262. We note the difference between an argument that a contract among private parties is unenforceable under some governmental policy recognized by the courts and an argument that governmental action itself is against "public policy." When applied against governmental action, the "public policy" contention only argues for a nontechnical application of the policies and purposes of the governing statutes, and that is how the PUDs present it here. "Statutory policy" probably is a better term than "public policy" to avoid confusion between the two.

We have mentioned in Parts VII and VIII a possible issue whether the cities and the PUDs may turn out to have exceeded their authority in one respect which also is an issue of statutory policy. This issue may arise from the "step-up" clause, § 17(c), which increases each participant's share under the agreement up to 25 percent to cover possible defaults by other participants. Insofar as the step-up clause covers assumption of a defaulting participant's share in the "dry hole" risk, that is to say, in the eventuality of a total failure of the projects. It may be argued to be a "guarantee" of the defaulting participant's debt rather

than purchase of an increased share of project capability. Such a guarantee may be beyond the cities' respective authorities. It also may be contrary to the statutory policy of ORS 225.480, as to the cities, and ORS 261.250, as to the PUDs, to which we have referred in Part III. We do not decide that question, because the only issue now before us is whether the agreements were invalid when the cities and districts entered into them, and a contingent promise to take an increased share of power or power capability would not necessarily be an impermissible "guarantee" at that time. Whether there are defenses arising out of developments subsequent to the cities' and districts' initial entry into the agreements is not before us in this appeal.

Apart from this possible issue, however, we think that the claim of statutory, or "public," policy adds nothing to the previous analysis of the statutory law itself. Statutes, of course, are susceptible to interpretation that takes account of their intrinsic policies and purposes. But if "public policy" were a separate and additional argument beyond the statutes, it would become a wild card in litigation that would undermine the ability to enter transactions in reliance even on the most sophisticated interpretation of the state's laws. As we find no violation of the statutes when the PUDs entered into the Participants' Agreement, we also do not find that they violated the state's public policy.

C. Other States.

We add a few words about the decisions of other supreme courts concerning these agreements.

The Supreme Court of Idaho has held that five Idaho cities exceeded their authority in entering the Participants' Agreement with WPPSS *Asson v. City of Burley, Idaho,* 105 Idaho 432, 670 P.2d 839 (1983). The court held that the obligations undertaken by the cities contravened the municipal debt limitation stated in Idaho's constitution. Article 8, section 3 of that constitution forbids any local government to "incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it

for such year without a vote of qualified electors and provision for a tax to pay the interest and principal, and it provides that any indebtedness or liability incurred contrary to the section "shall be void." The issue before the Idaho court was whether the cities' obligations to WPPSS escaped this debt limitation clause because repayments were to be made exclusively from utility revenues rather than taxes, and the court held that the clause nevertheless applied because past Idaho precedents had rejected the "special fund" doctrine that confines debt limitations to debts that expose future tax revenues. 670 P.2d at 845-6, *citing Feil v. City of Coeur d' Alene,* 23 Idaho 32, 129 P. 643 (1912). Although subsequent amendments of Idaho Constitution, Article 8, section 3, had exempted "special fund" financing for some purposes, the court held that the Participants' Agreement did not qualify under any theory.

Justice Bakes dissented. He maintained that "only because, through hindsight, the majority can see what a 'bad deal' the cities have made that they now attempt to extricate these cities from their precarious position" on constitutional grounds. The dissent also noted that the cities in fact might have defenses under ordinary contract law which were not involved in the constitutional challenge brought before the Idaho court, and concluded that the court "should not bend our Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses." 670 P.2d at 851. In any event, the Idaho court's decision differs from ours simply because Oregon law does and Idaho law does not recognize the "special fund" rule that confines debt limitation clauses, unless otherwise stated or intended, to debts that potentially expose the government's tax revenues.

The Supreme Court of Washington, also in a split decision, relieved that state's municipal participants of their obligations on different grounds. *Chemical Bank v. Washington Public Power Supply System, supra.* The majority held that their agreement with WPPSS was ultra vires because, although each

participant had authority to contract for the purchase of electric power, it did not have authority to contract to pay for power generating capability that might turn out to be zero. The dissenters, Utter and Dolliver, JJ., would hold that the authority to purchase power also includes the authority to contract for a share of an uncertain supply of power yet to be developed. This dissent, like Justice Bakes's in Idaho, also protested that the majority undertook to save Washington municipalities from the consequences of the mismanaged WPPSS projects at the cost of narrowly restricting the authority of local governments to serve their citizens.

On this issue, our view of Oregon's tradition of local autonomy and local responsibility is closer to that expressed by Justices Utter and Dolliver than to the majority's restrictive reading of Washington law. As stated in Parts VI and VII of this opinion, once it is conceded that the cities and PUDs had authority to contract for a share of an uncertain amount of electric power at a price based on the proportionate costs of that share, no legal reason appears why their authority ceases at the point where the possibility of little power at exhorbitant cost includes the possibility of no power at all.

We therefore agree with the basic position taken by the defendant cities, Springfield, McMinnville and Milton-Freewater. A supplemental memorandum filed by these cities suggests that the Washington court's decision released so many of the other participants that by the terms of the Participants' Agreement itself any question of the Oregon cities' authority to enter the agreement is moot. That point may relate to the possible "contractual defenses" mentioned by Justice Bakes's dissent, above. It does not relate to the present action, which was brought by parties who seek to invalidate the transaction, not by parties who seek to enforce it. We therefore express no view of any defenses to such an action under the agreements. We hold only that the transactions were not beyond the authority of the cities and PUDS or otherwise illegal when they were made.

X. CONCLUSION

In summary, the issues in the present litigation are whether the plaintiffs' action should have been dismissed as untimely, and if not, whether the named Oregon cities and people's utility districts had authority in 1976 to enter into the Participants' Agreement, and whether in doing so they violated any limitations in their respective charters, in statutes, or in the Oregon Constitution. This case and our decision does not involve any question of anyone's present obligations if the agreements were validly made at that time.

The authority to make contracts for city and PUD electric utility systems and the limits on that authority have long-term importance beyond the WPPSS debacle. We judge these issues as of the time the transactions were made, not by hindsight. First, we agree with the cities of McMinnville, Milton-Freewater, and Springfield that the cities had authority under their respective charters to make the agreements. So did the PUDs under Article XI, section 12 of the Oregon Constitution and the statutes enacted to effectuate that section.

Second, we hold that the cities' and PUDs' existing authority was not narrowed by enactment of the Thermal Power Facilities Act or the Joint Operating Agency Act, with the possible exception that ORS 225.480 and ORS 261.250 may impose a statutory policy against guaranteeing the financial obligations of other participants through the "step-up" clause when no power is supplied in return. That possibility would not vitiate the entire transaction when made and it need not be decided now.

Third, the bonds issued by WPPSS were not the bonds of the individual participants, nor did the cities or PUDs issue bonds in another form without complying with the procedures required for that purpose. Also, the PUDs' agreement to pay WPPSS did not constitute borrowing by the PUDs so as to violate the statutory limits on such borrowing.

Fourth, we follow long-established Oregon law in holding that the agreements with WPPSS did not contravene the cities' charter debt limitations because they were payable entirely from utility revenues, not from taxes. The agreements also did not represent an unconstitutional loan of credit to WPPSS, again because the cities' taxing power and future tax revenues were not obligated.

Fifth, the covenant to maintain utility revenues adequate to meet the participants' obligations did not delegate the cities' or the PUDs' future authority to determine the actual rates by which the revenues would be collected.

When all is said and done, this case is about the exercise of powers and responsibilities entrusted by the people of Oregon to their local officials.' The constitution and the laws reflect that Oregonians have been of two minds about this as about other matters. At least since the beginning of this century, Oregon more than many states has wanted its local communities to be able to act autonomously to serve local needs or desires. This tradition of venturesome community action is embodied in the adoption of the home rule amendments in 1906 and 1958 and the people's utility district amendment in 1930. But the constitution and statutes also hedge public ventures with procedural and substantive limits on financing those ventures by debt. These legal powers and limits must be known with substantial certainty if the state and local communities are to deal with others in accomplishing their necessary or desired projects. For many years it has been understood that, unless the opposite intent is shown, debt limitations in Oregon refer to debts that obligate the community's tax revenues. Substantial certainty in future public transactions requires respect for existing legal rules and precedents, even when hindsight calls a particular transaction into question. If any city, or the legislature, wishes to tighten the rules for the future, it is in its power to do so.

The design of the agreements at issue in this case went to the bounds of Oregon law. The argument that the bounds were

crossed has been ably and strongly presented, but ultimately it asks us to hold that the design was illegal as a whole though it remained within each separate rule. Retrospective judicial evaluation of individual transactions by such a standard would not be a rule of law. Courts in other states have reached different conclusions under the laws of their states, which differ from Oregon's. The ultimate obligations and remedies of the present and other parties in the light of developments after 1976 are not before us now. We hold only that the Oregon cities and PUDs did not exceed the limits of their authority when they signed the Participants' Agreement at that time.

The decision to join in the agreement was one of policy for responsible public officials to make. It was made under conditions and on terms largely created by BPA, the federal agency on whom local public entities have been dependent for supplies of electric power. Officials responsible for electric utilities without generating capacity were led to believe that they had little alternative to the proposal offered them. Their policy decision to commit themselves to a share of the power WPPSS would undertake to produce at projects WNP 4 and 5, including the risk of high costs and little or no power, may have been wise or unwise when it was made. But it was a policy choice, not one for this court to undo by devising new law for the purpose.

The decision of the circuit court is reversed and the case is remanded to that court for entry of a judgment and such further proceedings as may be necessary.

LENT, LINDE and ROBERTS, JJ., filed a concurring opinion.

PETERSON, C.J., filed a concurring opinion.

LENT, LINDE, and ROBERTS, Justices, concurring.

The proponents of the validity of the challenged transactions contend that the plaintiffs' action is barred by laches or estoppel. Some members of the court believe that the issue of laches need not be reached if the plaintiffs' claim loses on the merits. We believe that it should be decided first. The court also is divided on the correct analysis.

"Laches" and "estoppel" are not different words for the same issue. A defendant's claim of laches arises from a plaintiff's prejudicial delay in asserting a claim for equitable relief, while conduct that gives rise to equitable estoppel, whether or not involving delay, vitiates the merits of the estopped party's claim. A defendant's assertion that a plaintiff is barred by laches from pursuing the claimed relief therefore should be dealt with before deciding the case on its merits. When laches is correctly seen as a time bar to plaintiff's action, like a statute of limitations, the claim must be disposed of before reaching the merits, not as a final obstacle to otherwise proper relief. If the only plaintiff or all plaintiff's in a case are disqualified by delay in commencing litigation, there is no party in a position to press the case. Litigation of the merits then is wasted time and effort and, on appeal, would reduce an opinion on the merits to dicta.

Here the opponents of the transaction argue that laches does not apply against governmental agencies, or if it sometimes can apply, then not under the circumstances of this case. This court has never arrived at a coherent analysis of Oregon law on this issue. It does not agree on a coherent analysis today. Statement of a rule is not simple, because Oregon law has developed partly from statutory policy and partly from cases that follow no consistent principle. Nevertheless, a principle emerges from the statute and past holdings that is sufficient for the present case. Because we believe it essential to identify one or more plaintiff's who are not barred by laches before the court reaches the merits, we analyze the court's past opinions and the applicable premises in some detail. We conclude that laches does not bar litigation solely between governmental units or officials that is designed to determine the legality of a governmental program or activity.

"Laches" means neglect or inaction, as in "laxness" or "laxity." The statutory time period within which to commence an action at law presumptively indicates what is reasonable or unreasonable also for equitable relief, but the presumption can be overcome. *Albino v. Albino*, 279 Or. 537, 553, 568 P.2d 1344

(1977); *Willis v. Nehalem Coal Co.*, 52 Or. 70, 90, 96 P. 528 (1908).

It may be that if a private party had entered into a formal transaction as far-reaching and important as the one before us, on the strength of which others had irreversibly committed themselves to large and irrecoverable expenditures, and if the party waited five and one-half years to sue to be released from that transaction on grounds that it could not properly enter into it, the party's request for equitable relief would be barred by laches even though the statute allows six years to commence actions "upon a contract or liability." ORS 12.080. This is not an action upon a contract but to declare that no legal contract was made. But the cities and the PUDs are not private parties, and the ratepayers, who are private persons, were not parties to the challenged transactions. We therefore must examine how delay affects their rights to equitable relief.

Laches is often described as a "doctrine," and "doctrines," as compared with rules of law, are distinguished more by broad statements than by sharp cutting edges. This court's experience with fitting the doctrine of laches to the powers and duties of government is no exception.

The court early postulated that statutes of limitation do not run against the state, a postulate it found in the Latin *nullum tempus occurit regi,* unless the statute provides otherwise. *State of Oregon v. Warner Valley Stock Co.*, 56 Or. 283, 308, 106 P. 780, 108 P. 861 (1910). The statutes did in fact provide otherwise from the enactment of section 13 of Deady's Code in 1862 until its amendment in 1903, Gen. Laws § 13, p. 18 (1903). *See State Land Board v. Lee,* 84 Or. 431, 431-436, 165 P. 372 (1917). The present statute, ORS 12.250, provides:

> "Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit."

In the *Warner Valley Stock Co.* case, the court held that the state had failed adequately to allege and prove an excuse for its delay in suing to set aside certain deeds but should be allowed

to amend its pleading, thus implying without discussion that the state's suit otherwise would be barred. 56 Or. at 304, 312, 106 P. 780, 108 P. 861. On the strength of the implication in that case, the court in the next such suit said that it was "committed to the principle that the doctrine of laches is applicable to the state," but it held that laches was not shown. *State of Oregon v. Hyde*, 88 Or. 1, 40, 169 P. 757, 171 P. 582 (1918). Whether or not the quoted statement was justified when applied to suits to undo past conveyances, those cases gave no occasion to consider its wider implications, for instance for suits directed at preventing continuation of an unlawful condition or activity.

Nevertheless, the court later quoted the broad sentence that "doctrine of laches is applicable to the state" in cases in which the name of the state appeared only pro forma in actions by private relators to challenge the legality of school districts. *State ex rel v. School District No. 23*, 179 Or. 441, 461, 172 P.2d 655 (1946); *State ex rel. School District No. 9*, 148 Or. 273, 287, 31 P.2d 751, 36 P.2d 179 (1934). *See also State v. Union High School*, 152 Or. 412, 53 P.2d 1047 (1936). To apply the doctrine there the court had to turn what the statutues denominated as an "action at law" back into the extraordinary writ of quo warranto which the statutes had abolished and about which the court earlier had said that "[i]t is seldom that laches are imputed to a State in a *quo warranto* action to test the legality of an incorporation where the rights of the public are involved." *State ex rel v. Port of Tillamook*, 62 Or. 332, 334, 124 P. 637 (1912). The opinion in the *School District No. 9* case, *supra*, distinguished *quo warranto* actions brought to assert a public interest, in which the state is the real party in interest, from others brought in the name of the state by private parties in their own interest, and the court found the case to be of the latter kind. 148 Or. at 276-278, 31 P.2d 179. Again, in the *School District No. 23* case, *supra*, the court found that "the relator, and not the state, is the interested party," before holding that a delay of one year barred a taxpayer with knowledge of the facts from challenging the legality of the district and causing what the court described as "deplorable consequences." 179 Or. at 458-462, 172 P.2d 655.

The school district cases were treated as private actions by virtue of the characteristics of the relators and their interests. But when the state sued to set aside a probate order and to declare the decendent's property escheated to the state, the court rejected a defense of laches on the ground that it was not available against a suit by the government "to enforce a public right or to protect a public interest." *State v. Vincent*, 152 Or. 205, 214, 52 P.2d 203 (1936).

Two decisions of that period involved the defense of laches against suits on behalf of local governments. In *Amer. Surety Co. v. Multnomah County*, 171 Or. 287, 138 P.2d 597 (1943), plaintiff sued as subrogee of Marion County and defendant claimed laches. Plaintiff apparently conceded that "the sovereign is not exempt from the defense of laches," but the court found it unnecessary to consider the defense because the action was at law. 171 Or. at 324-328, 138 P.2d 597. *City of Pendleton v. Holman*, 177 Or. 532, 164 P.2d 434 (1945), was a suit to foreclose the lien of a street improvement assessment. Most of the opinion was devoted to rejecting defendants' argument that the statutes of limitations, though by then expressly excluding actions brought by governmental plaintiffs, nevertheless should apply against a city acting in its "private or proprietary capacity." The opinion described the street improvement as a "proprietary activity," and it again assumed without discussion that the foreclosure suit would be barred by laches, although the court held that the defendants had failed to plead the factual basis of this defense. 177 Or. at 548, 164 P.2d 434. But in a third case, a school district's action to recover funds paid out by a bank, the court stated that it was "not here concerned with private dealings but with matters affecting the public," and referred to the " 'well-settled' " that " 'no laches can be imputed to a municipal corporation, acting . . . in a public and governmental capacity.' " *School Dist. 47 v. U.S. Nat'l Bank*, 187 Or. 360, 383-384, 211 P.2d 723 (1949), *quoting Common School Dist. No. 61 v. Twin Falls Bank & Trust Co.*, 50 Idaho 711, 4 P.2d 342 (1931).

The most recent discussion of laches as a defense against a belated claim by the state occurred in *Corvallis Sand & Gravel v. Land Board*, 250 Or. 319, 439 P.2d 575 (1968). That was a

suit by a private company to enjoin an ejectment action brought against it by the State Land Board in order to establish the state's title to a riverbed, and the court noted that ejectment is an action at law and "laches is available only against a party seeking the aid of equity" 250 Or. at 324, 439 P.2d 575. Nevertheless, Justice Lusk, for the majority, proceeded with an extended review of the foregoing precedents, quoting from *State v. Vincent, supra,* that laches will not bar a suit "to enforce a public right or to protect a public interest," 250 Or. at 332, 439 P.2d 575, and concluding that the state's action sought to establish a title held in the state's governmental rather than its proprietary capacity. The opinion denied that the *Warner Valley Stock Co.* case had involved a "proprietary" rather than "governmental" claim and declared the statement in the *Hyde* case that the court was "committed" to applying, laches against the state to rest "upon an insecure foundation." 250 Or. at 326-338, 439 P.2d 575.[1] Justice O'Connell, dissenting, maintained that these distinctions could not decide the fairness of allowing the government a delayed claim against a private party. Because the real controversy was over the right to gravel, which the state dealt with in the same manner as private persons, he would have applied laches in the same manner as in litigation between private parties, 250 Or. at 330, 342, 439 P.2d. 575.

Undeniably the distinctions between "public" and "private" rights or between "governmental" and "proprietary" functions are inexact tests for barring delayed suits by the state or local governments. As Justice O'Connell wrote, they may serve to label easy cases but fail in difficult ones. 250 Or. at

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[1] The court found it difficult to explain its then recent decision in *Johnson v. Tax Commission,* 248 Or. 460, 435 P.2d 302 (1967), which held an assessor estopped, in his obviously public function of tax collection, to insist on a filing deadline which the taxpayer missed because the assessor sent him an outdated form. The court simply described it as an "exception." 250 Or. at 329, 439 P.2d 575. In any event, as the lead opinion in *Wiggins v. Barrett & Associates,* 295 Or. 679, 669 P.2d 1132 (1983) makes clear, *Johnson* and its successor, *Pilgrim Turkey Packers v. Dept. of Rev.,* 261 Or. 305, 493 P.2d 1372 (1972), dealt with estoppel, not with a defense of laches based on delay.

341, n.4, 439 P.2d 575. Moreover, those phrases are employed in other contexts where other rules or policies may cause these lines to be drawn differently than in the context of defenses against belated assertions of legal claims. Little is gained by describing an activity, for instance the construction, operation, and maintenance of streets or other public facilities, as "proprietary" for purposes of one legally correct outcome and "governmental" for purposes of another. Nor is it self-evident why an action to escheat a decedent's property asserts a "public" interest but an action challenging the legality of a school district asserts only a "private" interest when initiated by a taxpayer. *Compare State v. Vincent, supra, with State ex rel. v. School District No. 23, supra.*

Shortcomings in judicial formulas, however, do not prove error in the holdings they seek to express. The foregoing cases show that in barring suits by government for laches, lines sometimes have been drawn by the characteristics of the plaintiff, by the interest asserted, or by the relief sought. The lines obviously seek to accommodate competing policies, to preserve the legal responsibilities of government on one hand and fairness to those against whom government litigates on the other, but it does not follow that a balance between these policies simply is struck for each case. Without attempting a comprehensive statement in this case, we find in the past decisions elements for an analysis besides those already discussed.

First, the fact that "laches" is an equitable doctrine rather than statutory law tends to mask the fact that its application against the government nonetheless is as much a question of law as the application of a statute of limitations. Even when government sometimes acts like a private party, the two differ insofar as the state, unlike a private party, can legislate for itself whether to be bound by periods of limitation. *Cf. Wiggins v. Barrett & Associates,* 295 Or. 679, 700-701, 669 P.2d 1132 (1983) (concurring opinion). The legislature has done so in ORS 12.250, previously quoted, which exempts both the state and local entities from general periods of limitation. Obviously,

the state's policy toward delayed private litigation is not its policy toward delayed litigation by governmental plaintiffs.

To interpret a statute of limitations which is silent with respect to government as not binding the state attributes that policy choice to the state itself. In *Withers et al, v. Reed,* 194 Or. 541, 243 P.2d 283 (1952), which concerned a statute terminating unused water rights, the court concluded that although the statute did not expressly apply to rights held by the state, its dominant policy was to return the water to potential beneficial use by others. Justice Lusk's lead opinion for three members of the court observed that "*nullum tempus occurrit regi*" depends on policies implied in the face of legislative silence. Relevant here is his quotation of "the classic exposition of the doctrine" by Justice Story in *United States v. Hoar,* 2 Mason 311, 313 (1821):

> " 'The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects,) is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments,* * *' "

quoted in 194 Or. at 544-545, 243 P.2d 283.

The "great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers," sometimes requires belated legal action by those officers, or by their successors. Sometimes it requires legal action by private citizens in the name of the state or in other forms of action provided for the purpose. If a policy governing laches is to allow for preserving public property as well as

public rights, it cannot well exclude the "proprietary" activities of public agencies. Some public agencies, like the people's utility districts in this case, exist only for "proprietary" functions of delivering goods and services; they do not "govern" people.

Why should the government, or an interested citizen, ever be barred from confining governmental action within legal bounds and from calling upon a court to declare and enforce those bounds? As this court's past opinions show, the early generalization that "the doctrine of laches is applicable to the state" was too broad. Yet the opposite need not be true, that laches never applies.

When the state sends its agencies into the market to engage in ordinary commercial and property transactions indistinguishable from those of private enterprises, the state's implied policy may be to give those transactions the same security against belated litigation of ordinary disputes. Early decisions stretched concepts such as "proprietary activity" in order to extend that security to private interests in property, particularly real property. This may explain barring the city's belated lien foreclosure in *City of Pendleton v. Holman, supra,* as well as the suits to set aside deeds in the *Warner Valley Stock Co.* and *Hyde* cases, *supra.* There is less reason to assume such a policy toward actions seeking declaratory or prospective relief from continuing a disputed transaction or condition, as in *Corvallis Sand & Gravel v. Land Board, supra.*

Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers.[2] WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that

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[2] None of the rural electric cooperatives that have fractional participation in the Participants' Agreements are parties here, and their characterization as private or government-sponsored entities is immaterial to the present point. Nor are private lenders or suppliers to WPPSS parties to this litigation.

state. *See Chemical Bank v. WPPSS,* 99 Wash.2d 772, 666 P2d 329 (1983). The Participants' Agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public program does apply, at least as to the municipalities that are challenging the program.

A few cases elsewhere contain statements to the contrary. In a dispute between a county and certain municipalities over the distribution of fuel taxes, an Arizona court stated the rule that "neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat a public interest." But the court then continued that "the reason for the rule denying the defense disappears when the contest is solely between two public bodies." *Maricopa County v. Cities & Towns of Avondale, et al.,* 12 Ariz. App. 109, 113, 467 F.2d 949 (1970). It appears that the court was influenced by the idea that some taxpayers might gain and others might lose by a judicial examination of the financial distribution. Such a rule would prevent challenges to governmental illegality merely because the private interests of the taxpayers of the government which acted illegally would be adversely affected by ending or correcting the illegality. That is not a persuasive reason why alleged governmental irregularities should escape scrutiny.

The Arizona court cited two other cases. In *State ex rel v. Clay County,* 226 Iowa 885, 285 N.W.2d 229, 235 (1939), a dispute about which county was liable for a person's support in the state hospital, the opinion recognized the general rule

against applying "laches" to the acts of governmental agents to be "for the protection of the public," but as between two counties the court saw "no good reason why public policy should require that the people of one be penalized for the laches of the representatives of another." This Iowa opinion discussed both estoppel and laches without making a clear distinction between them. It appears that in the quoted sentence, the court addressed the effect of an earlier neglect by one county on the merits of its position rather than the procedural effect of delay in commencing the suit.

The other precedent cited by the Arizona court, *Royal Oak Tp. v. School Districts No. 7*, 322 Mich. 397, 403, 33 N.W.2d 908 (1948), states that Michigan law applies the doctrine of laches between municipal corporations. But the Michigan court's full statement also rejects the rule that laches does not bar a municipality's enforcement of "public rights," apparently against anyone. Oregon law differs from Michigan. This court's decisions recognize the "public rights" exception to laches in suits by the state, *State v. Vincent, supra,* or initiated by local relators, as in the *School District No. 9* and *Port of Tillamook* cases, *supra.*

The three cases from other states do not state the law in Oregon. The directive of ORS 12.250, that the general limitation periods "shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit," applies to actions by governmental bodies in their "proprietary" capacities. *City of Pendleton v. Holman, supra,* citing *American Surety Co. v. Multnomah County, supra, Seeck v. City of Lebanon,* 148 Or. 291, 36 P.2d 334 (1934). About the contention that actions by municipalities should be time-barred if they concerned "proprietary activities," the court wrote:

> "Had it been the intention of the legislature to subject municipalities to the operation of the statute of limitations in their proprietary activities, it could have accomplished

> its purpose in one of two ways. Either it could have repealed outright § 13 of the 1862 Code of Civil Procedure, or, in the amendment of that section in 1903, it could have exempted municipalities from the operation of the statute only to the extent of their public or governmental functions. It did neither."

177 Or. at 541, 164 P.2d 434. In a fairly recent case, *Chizek v. Port of Newport*, 252 Or. 570, 450 P.2d 749 (1969), the court cited ORS 12.250 and the quotation from *State Land Board v. Lee, supra*, that the principle of denying limitations against government is "to preserve public rights, revenues and property from injury and loss by the negligence of public officers." 84 Or. at 434, 165 P. 372. The court allowed the port belatedly to set aside an adverse title gained by an invalid tax foreclosure, obviously a "proprietary" issue:

> "When the property of one division of government is lost to another division of government and then sold to a private party, the public is not served. The only party who gains is the purchaser at the foreclosure and there is no policy reason to prefer him over a public body.
>
> "We hold that the Port, as a public body, is not barred by the statute of limitation and the tax foreclosure proceeding is invalid and, therefore, the plaintiffs secured no title to the disputed property."

252 Or. at 573, 450 P.2d 749.

The law in this state is that actions by the state or municipalities are not barred by the statute of limitations, irrespective whether they concern "proprietary" activities, as most civil actions do. ORS 12.250. That is the state's announced public policy on the question, and this court so treated it as recently as 1969.

It makes no sense to draw a line for imposing time limitations on declaratory judgment proceedings by a governmental plaintiff that would depend on whether the proceeding is characterized as being "in law" or "in equity," if an action

under chapter 28 simply asks for a declaration of the legal rights, status, or relations of the parties, ORS 28.010, no limitation under ORS chapter 12 would apply irrespective whether the subject matter concerns "proprietary" activities. Nor would it apply to a damage action for breach of contract, fraud, negligence, or whatever. ORS 12.250. Moreover, insertion of such a line around equitable relief arising from "proprietary" activities, as the Chief Justice's concurring opinion proposes, then carries with it a further exception for claims by governmental plaintiffs that their past actions were "ultra vires," forcing trial courts to litigate that difficult and imprecise issue at the initial stage of determining whether the plaintiff is barred by time from maintaining the litigation.

Despite expressions in some of the early opinions we have reviewed, the court's holdings do not establish such a rule. The holdings generally have rejected claims of laches against public plaintiffs asserting public rights. The few exceptions have been cases protecting a private party's reliance on past governmental property or business transactions. With governmental agencies on the opposing sides, this is not such a case. As to these contending agencies, the applicable principle, recognized in ORS 12.250 and quoted by Justice Lusk, is " 'the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Withers et al v. Reed, supra,* 194 Or. at 545, 243 P.2d 283 (quoting *United States v. Hoar,* 2 Mason 311, 313). That principle prevents barring the cities from pursuing this declaratory judgment action against WPPSS, despite the undoubted "proprietary" character of their electric utility functions.

PETERSON, Chief Justice, concurring.

I join without reservation in the opinion of the court.

As is apparent from the separate concurring opinion of Lent, Linde and Roberts, JJ., the court is not in agreement on the laches question.

The main underpinning for their conclusion that laches does not apply appears to be that because a substantial part of

this litigation is between governmental agencies and concerns the powers of those agencies, this case does not fit the assumptions for an implicit policy of the state to apply laches against belated claims of its own agencies. Such discussion as there is to support the stated conclusion is found at page 606 of 296 Or., at pages 1349-1350 of 679 P.2d of concurring opinion where this statement is made:

> "Assuming there is a policy implicit in the state's commercial or property transactions to secure private parties against the belated assertion of ordinary legal claims, this policy does not bar the present litigation for laches. The parties to this litigation are governmental entities, except for the ratepayers. WPPSS is a statutory agency and municipal corporation of the State of Washington, composed of other public agencies of that state. *See Chemical Bank v. WPPSS*, 99 Wash. 2d 772, 666 P.2d 329 (1983). The participants' agreements are not ordinary transactions with private parties in the commercial marketplace. They were designed for governmental entities, with the active participation of the federal Bonneville Power Administration (BPA), and with conscious concern about the legal powers of the participating agencies. They are agreements between governmental officials to create and conduct a publicly administered program. The implicit policy of protecting existing property interests of private persons against delayed lawsuits when a public agency has dealt with them in a conventional commercial or property transaction simply does not apply to this program. The larger policy that normally excludes laches in actions brought to assert a public interest in the conduct of a public program does apply, at least as to the municipalities that are challenging the program." (Footnote omitted.) 296 Or. at 606, 679 P.2d at 1349-1350.

Their concurrence strikes me as lacking analysis to support the stated conclusion. If laches is otherwise assertable, why should the laches rule differ if the suit is between governmental bodies? I believe that the rule should be the same in both

situations. Let me give an example to put the issue in clearer perspective.

Suppose the city of Drain (Drain is a small community south of Springfield. Both are parties in this case.) concurrently contracts with two parties for electrical power. One contract is with the city of Springfield; the other is with a private supplier, PNW Electric. Suppose that identical contract disputes arise between Drain and its suppliers and Drain seeks equitable relief. Finally, suppose that Drain is guilty of laches.

Under the theory of the other concurring opinion, PNW will successfully defend the Drain claim because laches will bar Drain's claim. Springfield's attempt to invoke laches will not succeed because it, like Drain, is a public body. Springfield and its citizens will be required to perform obligations which its private counterpart, under identical circumstances, will not be required to pay or perform.

The point is that if, under the facts of any case, equitable relief should be denied because it is inequitable to enforce the claim, whether the party invoking laches is a private person or a municipal corporation is beside the point. That has been the decision of every court which has considered the matter.[1] It should be ours as well.

In *Maricopa County v. Cities & Towns of Avondale,* 12 Ariz. App. 109, 467 P.2d 949 (1970), a county sought to recover the amount of use fuel tax monies it had mistakenly paid to the defendant cities and towns. The court held that laches may defeat the claim, saying:

> "Laches may also defeat a claim for restitution. Restatement, supra, § 148. Laches involves an unreasonable delay after knowledge of the facts which works a hardship. *Id.* The County contends here that laches cannot be so applied as to bar a claim by a public body in its

[1]The writers of the other concurring opinion state that "[a] few cases contain statements to the contrary." 296 Or. at 606, 679 P.2d at 1350. I have found no case that holds that if laches otherwise were a defense it would not apply because both parties are public bodies.

governmental capacity. We agree to the extent that neither laches nor its generic parent, estoppel, can be asserted to gain rights against the public or to defeat the public interest. [Citing cases.] But the reason for the rule denying the defense disappears when the contest is solely between two public bodies. State ex rel. *O'Connor v. Clay County,* 226 Iowa 885, 285 N.W. 229, 235 (1939). Accordingly, as between municipal corporations, the defense of laches is available. *Royal Oak Township v. School District No. 7,* 322 Mich. 397, 33 N.W.2d 908, 911 (1948)."

The Michigan court reached the same result in *Royal Oak Tp. v. School Dist. No. 7,* 322 Mich. 397, 33 N.W.2d 908 (1948). The Michigan court, in rejecting the claim that laches was not applicable against a municipal corporation, stated that "the law is well settled that as between municipal corporations the equitable doctrine is applicable."

The Supreme Court of Iowa, in *State ex rel O'Connor v. Clay County,* 226 Iowa 884, 285 N.W. 229, 235 (1939), applied laches, saying:

> "Public policy in some cases does forbid the application of the doctrine of laches to the acts of an arm of the government through its representatives. This is for the protection of the public. But where two counties are the interested parties there is no good reason why public policy should require that the people of one be penalized for the laches of the representatives for the other. The law should as far as possible, protect both, without preference to either."

See also Independent School District No. 4 v. State Board of Ed., 451 P.2d 684, 687 (Okla. 1969).

The cited cases state a rule directly contrary to the conclusion of the other concurring opinion. In Arizona and Iowa, similar to Oregon, the general rule is that public policy forbids the application of laches to an arm of the government if a public right or public interest is at issue. In both of the cited cases from Arizona and Iowa, the courts nonetheless applied laches in cases involving governmental acts. In Oregon we have followed the government/proprietary distinction; laches is available as a defense to a claim of a public body acting in a

proprietary capacity. Making laches available as between public bodies, especially when the actions at issue are proprietary, is consistent not only with our precedents, but with the policy cited above that the citizens of one public body should not be penalized for the laches of the representatives of the other.[2]

Laches is the label for a rule that relief will be denied as inequitable in those cases in which unreasonable delay in asserting rights results in disadvantage or prejudice. The rule is of long standing. The reasons for applying laches in disputes between governments are as applicable here as in a "conventional, commercial or property transaction," (296 Or. at 606, 679 P.2d at 1350) and we should not abandon the doctrine in this case. If laches is made out, I would grant public bodies no fewer rights than private concerns. I see no reason to change the laches rule simply because the dispute is between public bodies.[3]

Because of the court's unanimous decision that the local public bodies who entered into the challenged agreements had legal authority to do so, it is not necessary to decide whether the trial court erred in striking the WPPSS laches affirmative defense. Therefore, all statements made in the concurring opinions concerning laches are dicta (except for this sentence).

CAMPBELL, CARSON, and JONES, JJ., join in this concurring opinion.

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[2]Furnishing electric power is a proprietary function. *Twohy Bros. Co. v. Ochoco Irr. Dist.*, 108 Or. 1, 40, 210 P. 873, 216 P. 189 (1922).

[3]I also disagree with a number of other statements contained in the other separate opinion but will not take the time and space to explain the reasons for my disagreement. The writers of that opinion would inter the governmental/proprietary distinction which has been applied in a number of cases and would overrule our precedents denying relief to private relators. 296 Or. at 605, 679 P.2d at 1349.

Appendix H

677 P.2d 799

PACIFIC POWER & LIGHT COMPANY, a corporation,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
LOWER VALLEY POWER & LIGHT INC.,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
CHEMICAL BANK, a New York corporation,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Appellant (Petitioner)

v.

THE PUBLIC SERVICE COMMISSION OF WYOMING,
Appellee (Respondent).
Nos. 83-75 to 83-78.
Supreme Court of Wyoming.
Feb. 7, 1984.
Rehearing Denied March 8, 1984
in No. 83-75.

Affirmed as to utility and dismissed as moot as to all other appellants.

Rose, J., concurred specially and filed opinion.

Thomas, J., dissented and filed opinion.

Houston G. Williams of Williams, Porter, Day & Neville, P.C., Casper, and Leonard A. Girard, Portland, Or., for appellant Pacific Power & Light Co.

Ted C. Frome, Afton, for appellant Lower Valley Power & Light, Inc.

Carl L. Lathrop and Richard P. Boley of Lathrop & Uchner, Cheyenne, for appellant Chemical Bank.

Thomas A. Nicholas and Alan B. Minier, of Hirst & Applegate, Cheyenne, and Michele Coad, Seattle, Wash., for appellant Washington Public Power Supply System.

A.G. McClintock, Atty. Gen., Steven R. Shanahan, Sr. Asst. Atty. Gen., and Ennis M. Boal, Asst. Atty. Gen., for appellee The Public Service Com'n of Wyoming.

Before ROONEY, C.J., and THOMAS, ROSE, BROWN and CARDINE, J. J.

ROONEY, Chief Justice.

This is an appeal from a district court ruling affirming an order of the Wyoming Public Service Commission (PSC) which denied appellants the right to recover in rates any and all investments, expenses or obligations related to three abandoned nuclear power construction projects.

We hold the matter to be moot as to all appellants except Pacific Power & Light Company (PP & L), and we affirm the decision of appellee insofar as it pertains to PP & L.

There are four appellants. Appellant Lower Valley Power and Light, Inc. (LV) is a distribution level electric cooperative. Appellant PP & L is a publicly held corporation providing electric service as a regulated public utility. Both LV and PP & L are electric public utilities within the regulatory jurisdiction of the Wyoming PSC. Appellant Washington Public Power Supply System (WPPSS) is a joint operating agency which builds, owns and operates electric generation and transmission facilities and sells electric power to its members and others. Appellant Chemical Bank (CB) is a New York corporation which is a bond-fund trustee.

LV and Fall River (FR), another distribution level electric cooperative which is not a party to this appeal, along with 86 other electric utility cooperatives, municipalities, and public

utility districts, each signed, on July 14, 1976, identical Participants' Agreements (Agreements) which entitled them to a percentage share of power from two nuclear power projects (WNP-4 and WNP-5) which WPPSS was constructing in the state of Washington and which obligated them to pay a proportion of the costs of said projects "whether or not" the projects were ever completed. PP & L was a 10% owner of WNP-5, and also was participating in another nuclear power project known as Pebble Springs, WPPSS financed its ownership shares of WNP-4 and WNP-5 through the sale of municipal tax exempt bonds. CB is the bond-fund trustee for said bonds.

The Agreements executed by LV and FR were not submitted to the PSC for review or approval prior to their execution, or at any time subsequent.

Construction of WNP-4 and WNP-5 was begun in 1976 and abandoned in 1981, when WNP-4 was 16% complete and WNP-5 was 20% complete. The Pebble Springs project was terminated in 1982, with no construction ever being done, but with over $200 million invested in site preparation. No electric power will ever be generated by any of these three power plant projects.

The controversy was initiated by the PSC under its investigative powers pursuant to § 37-2-117, W.S.1977[1] through a "Notice and Order Setting Hearing" made and entered on April 22, 1982 and directed to LV, PP & L and FR. The Commission Staff had previously petitioned the Commission to investigate the matter as to LV. Of course, the Commission could institute the investigation without such petition "summarily" and "of its own motion". It did so with its "Notice and Order Setting Hearing". The record amply reflects the waiver

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[1] Section 37-2-117, provides:

"Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same."

of any defect or objection in and to the investigation by PP & L. The scope of the investigation was also explored and understood by the parties, and the hearing proceeded on the issue of whether or not the investment, expenses and obligations incurred by PP & L and LV in the projects could be properly considered in fixing the rate base for their operation, and it did not proceed on the issue of what the rates should be, *i.e.*, a rate case.

The transcript reflects that all parties recognized the correct issue and that it would be pertinent to rates and the procedure and evidence would be similar to that of a rate case. The following occurred prior to the testimony of the first PP & L witness:

> "MR. ROGERS [Representing PSC Staff]: . . . I do have one additional matter.
>
> "CHAIRMAN SMYTH: Yes.
>
> "MR. ROGERS: And that is concerning the filing by the company made on July 2, 1982, pursuant to the commission's order. The commission will recall that these matters were originally set for hearing on July 16th of 1982, pursuant to the commission order of April 22, 1982.

"Upon the motion of the staff the hearings were continued until this week, and that was made pursuant to the commission's order of May 28, 1982. And contained within that order was a provision that all testimony by all parties was to be filed on or before July 2, 1982.

"Now, I don't know if the commission is aware, but as part of the company's filing on July 2, on or about July 2, they filed tariffs, and those tariffs contain a request for a change of rates in amounts variously set at $5,743,000, or $10,967,000. It was the staff's understanding at the beginning that this was to be a generic matter, that it was not to be a rate matter. The filing made by the company has changed that to a contested case.

> "And the staff has concerns regarding the notice requirement of the Administrative Procedures Act, with

regard to this matter. I am sure that the commission will recall its own rulings, that a rate making matter is a contested matter under the act, and the commission, or the act is very specific with regard to the notice required.

"And I think that this matter should be resolved by the commission in some way. I have broached the matter with Mr. Girard, and we are attempting to come up with some type of a solution to the problem, but I think that the commission should be made aware of it prior to the beginning of this testimony.

"CHAIRMAN SMYTH: Mr. Girard, do you wish to respond to that?

"MR. GIRARD: Very briefly. Mr. Rogers is correct, he made me aware of this matter, I think it was five or six minutes before the hearing commenced this afternoon, so he and I didn't really have time to have a calm lawyer-like discussion of the problem. He agreed to raise it to bring it to your attention. The only thing I will say is this: The purpose of the generic proceeding, I believe, was to determine how to deal with the costs of the nuclear plants at issue.

"And the question the company had was: The generic proceeding presumably will consider how much was spent, why was it spent, was it reasonable, who bears the risk of that and so forth. And let us assume just for discussion, that the commission considered all that, and after deliberating said, 'We think the total costs that should be borne by ratepayers are, say, $10 million a year for five years'.

"Then the question would get to be, 'What would then happen?' Presumably, if the company hadn't filed rates it could then file rates designed to achieve the level of revenues found appropriate by the commission. And we would then wonder, would we have a rate case in which every issue would be open again, and we would then retry the question of who should pay for the nuclear plants.

"We figured that the commission likely didn't want to do that, that this is the hearing to find out how that

expenditure is going to be dealt with. There may be a question as to exactly how the—which particular ratepayer should pay for it, but we would think that there should be one time and one time only to decide, is that a stockholder responsibility, a ratepayer responsibility, or anywhere in between.

"That's all I have to say.

* * * * * *

"CHAIRMAN SMYTH: We will come back to order.

"The commission feels very strongly, not just a little bit, that this was wrong, that we cannot have a rate case without giving notice to the public, and that any issues as to asking ratepayers to pay for amounts in the future, will be taken care of in future rate cases and will not be taken care of in this generic hearing which is to determine whether or not any amount should be involved.

"And therefore, there being no notice to the public, and certainly in these cases significant intervention has been made by the public in the past, we will restrict the hearing to those matters that have previously been noticed and that as to what rates you are required in the future to pay for any amounts that might be found will be a matter to be determined in the future rate case.

"And perhaps, since you already have one filed before us, that it might be a more proper time to discuss those kinds of issues.

"So, if you will proceed on that basis, Mr. Girard.

"MR. GIRARD: Fine, thank-you.

"I should have mentioned that when the revised rate schedules were filed, notice was posted, there was not a mailing made or I don't think a newspaper publication made. I wanted [sic] :he record to show that, and I am not arguing it was adequate or what is not.

"We will present the case and the only question is, whether we should try and strike from it, if you will, before we ask our questions that material that might be offensive.

"One thing I think, Your Honor, Mr. Chairman, is that the testimony of witness Sloan, who is our rate witness, may be appropriate, and we will have to allow you of course to make the ruling when the time comes, to at least show for illustrative purposes the type of impact there would be on the ratepayers.

"CHAIRMAN SMYTH: I might express to you that we will be restrictive and we are talking what is required rates of return at this time. That's matter for rate cases, and I am sure by the time we get down to that testimony, we will have had lots of testimony before this commission. I do not want to in any way impair your presentation of this case.

"However, the ground rules are those matters that are germane will be heard, those matters that are not presumably staff will object to them and they will not be heard, and if staff doesn't object to them, if I find they are not material I will certainly advise you, and as you well know I am not bashful in this manner.

"MR. GIRARD: I would stipulate that.

"(Laughter.)

"MR. ROGERS: So will staff."

Again, before presenting the testimony of PP & L's witness Watson:

"MR. GIRARD: . . .

"This case, of course, based on the ruling of the Commission will not involve a contested rate case. . . .

* * * * * *

"I discussed this part with Staff Counsel because the concern, I'm sure, that Staff has and the Commission has is this isn't a general rate case. . . .

* * * * * *

> " . . . It is the Staff's position and has been from the beginning that the issue in this case is whether or not the ratepayer should pay. . . .

The Commission's investigation had for its purpose the determination of whether or not the investment, expenses and obligations incurred by PP & L and LV in the projects could be considered in connection with rates later to be set for PP & L and LV in Wyoming.

> "(a) The term 'rate,' when used in this act, shall mean and include . . . every . . . charge or other compensation for service rendered or to be rendered . . . and every . . . practice, act, requirement or privilege in any way relating to such . . . charge or other compensation . . ." Section 37-1-102(a), W.S. 1977.

Section 37-2-117, W.S.1977, supra, fn. 1, authorizes investigation of "any act . . . accomplished or proposed, or an investigation of any rate" which the Commission believes should be made "to secure compliance with the provisions of this act and orders of the commission."

The association of PP & L and of LV with the projects are certainly acts and practices "in any way related" to the charges and compensation for services to be rendered by them. And the Commission could well believe that an investigation was proper to determine if the projects were or could be part of that subsequently to be considered in fixing rates pursuant to § 37-2-122(a), W.S.1977, infra, fn. 5.

The PSC concluded that the Agreements executed by LV and FR constituted a guarantee of securities as contemplated by § 37-6-101 et seq., W.S.1977, and that their failure to obtain PSC authorization rendered the Agreements void for rate making and other purposes within the regulatory jurisdiction of the PSC. Further, that the costs incurred by LV, FR and PP & L could not be lawfully passed on to their rate payers, as the projects were not and would not be "used and useful" for the convenience of the public.

Appellants LV, PP & L, WPPSS and CB all filed petitions for review of the Commission Order, which were ultimately consolidated. The district court affirmed the Commission Order without independent review, whereupon appellants appealed to this court.

Lower Valley, Washington Public Power Supply System, and Chemical Bank

While all of the litigation below was going on, litigation was also progressing in other states. The decisions reached in the state of Washington are particularly significant to the case before us presently.

The Washington Supreme Court had before it the case of *Chemical Bank, a New York corporation v. Washington Public Power Supply System,* 99 Wash.2d 772, 666 P.2d 329 (1983). It involved WNP-4 and WNP-5, wherein CB brought a declaratory judgment action against WPPSS and the participants (those who had signed Participants' Agreements, including LV and FR) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, of which CB is trustee, with interest. The Washington Supreme Court held that the defendants who were Washington public utility districts or Washington municipalities lacked authority to enter into said agreement and as to them the agreement was ultra vires, void ab initio, invalid, ineffective and unenforceable.

Subsequently, and pursuant to mandate from the Washington Supreme Court, the Superior Court of Washington for King County, in its Order and Judgment, held that:

> "2. Inasmuch as the Participants' Agreement is ultra vires, void ab initio, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority

of Washington public utility districts and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability."[2]

Further, the Superior Court held that:

"3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the 'Bond Resolution'), to make any payment to WPPSS, or to any other defendant, or to Chemical or to any purchaser or holder of bonds issued by WPPSS in connection with the Projects."

We agree with the Washington Superior Court that because the Participants' Agreement is void ab initio as to 68.275% of the participants, [3] it is also ineffective and unenforceable as to the other participants on the grounds quoted above. Therefore, we hold that the case at bar is moot as regards appellant LV. LV has no debt because of the projects' failure and the issue is not pertinent to any case now or hereafter filed by LV.

". . . [W]hen no judgment rendered can be carried into effect the cause is moot . . . ." *Belondon v. State,* Wyo., 379 P.2d 828, 829 (1963).

This being so, we also hold that this case is moot as to WPPSS and CB, as their interests were predicated on the validity of the Participants' Agreement.

Pacific Power & Light

The above considerations do not control the disposition of appellant PP & L, as PP & L was not a participant under the Participants' Agreement, but rather a 10% owner of WNP-5, and 29.4% owner of Pebble Springs.

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[2] *Chemical Bank v. Washington Public Power Supply System,* Case No. 82-2-06840-3, August 11, 1983.

[3] Namely, the Washington Public Utility districts and Washington municipalities.

OSC founded its decision, relative to PP & L, on an application of the provisions of § 37-2-119, W.S.1977, which provides in part:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value . . . ."

Emphasizing the "used and useful" language of this section, PSC found the investment, expenses and obligations incurred by PP & L could not properly be considered in fixing the rate base for PP & L's operation.

If the projects had been successful and had gone on line for production of electricity for public convenience, the cost or value would have been properly considered in establishing a rate base. Since they were not successful and were only partially constructed, they could never become "property" of a "used and useful" nature. Although the project undertakings might conceivably be part of the "business" of PP & L,[4] we need not determine such inasmuch as the business activity relating to the projects was not current so as to meet the "used and useful" requirement, as the "used and useful" status must be as of the time of rate consideration. *Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); *Boston Gas Company v. Department of Public Utilities,* 367 Mass. 92, 324 N.E.2d 372 (1975); *South Dakota Public Utilities Commission v. Otter Tail Power Company,* S.D., 291 N.W.2d 291 (1980).

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[4] Business is " 'the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain.' " *In re Lamont,* 48 Wyo. 56, 41 P.2d 497, 502 (1935). Business is " '[a]ny occupation connected with the operations and details of trade or industry.' " *Zurich Insurance Company v. Friedlander,* 261 Md. 612, 276 A.2d 658, 660 (1971).

Although the investment, expenses and obligations resulting from the projects do not conform to the "used and useful" concept, PP & L contends that they could still qualify for consideration in establishing a rate base if they are a prudent, reasonable and proper expense of operation.[5] Other jurisdictions have dealt with the obligations herein considered as operating expenses and not as property under the "used and useful" principle.[6]

We cannot accept the investment, expenses and obligations incurred in construction, or intended construction of property which would normally qualify as "used and useful" for inclusion in a rate base as an operating expense. An operating expense includes:

> "In general, various particular expenses of a public utility are properly chargeable to expense of operation, including any legitimate expense contributing to the better management or greater efficiency of the utility, a reduction of its

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[5] Section 37-2-122(a), W.S.1977, provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

[6] See *Office of Consumers' Counsel v. Public Utilities Commission*, 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820 (1981), dismissed *Cleveland Electric Illuminating Company v. Office of Consumer's Counsel*, 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), where the court quoted the commission order as stating, " '. . . [t]hus, we now see the wisdom of the standard emerging from the cases from other jurisdictions; if the expenditures are prudent, amortization should be permitted.' " Id. 67 Ohio St.2d 153, 423 N.E.2d at 825. The court also said: "[t]he core issue . . . is whether the commission lawfully and reasonably permitted CEI to treat its investment in the four cancelled nuclear generating stations as amortizable costs." Id. at 825. "There is no question but that the overwhelming weight of authority from other jurisdictions supports the position of the commission." Id. at 826. However, that court disallowed amortization, based on its interpretation of the Ohio statute relating to service-related costs that a utility may recover from its rate payers.

investment, or an increase in its operating return. . . ." 73B C.J.S. Public Utilities, § 36 p. 234.

Unified systems of accounts prescribed by most regulatory agencies usually specify that considered as operating expenses, i.e., taxes advertising, salaries, commodity purchases and similar items. The PSC recognizes that it cannot ignore the necessary, fair and reasonable expenses of operation incurred by a utility in the rendition of service, and also that there are certain expenses which should be disallowed, such as the following:

"1. If the questioned outlays represent 'inefficiency' or 'improvidence', or

"2. Managerial discretion has been abused, or

"3. The action taken has been 'arbitrary' or 'inimical' to the public interest, or

"4. There has been 'economic waste', or

"5. Such outlays were not legitimate operating expenses because they were 'in excess of just and reasonable charges.' "[7]

In contending that the charges were "operating expenses", PP&L argues that a reasonable and prudent test should be allowed. We need not consider this test insofar as it applies to "operating expenses" since these charges were not "operating expenses" as that term is generally considered.

It is probable that PP & L would not contend these expenses to be "operating" ones if the projects were completed. PP & L would then own a percentage of property; and it would expect to have the cost of the project included in the amount attributed to its "used and useful" property in establishing a rate base.

The argument in this case results from the situation in which PP & L suffers financial loss due to failure of a project

[7] Brief of the Staff of the Wyoming Public Service Commission, before the Public Service Commission of the State of Wyoming, quoting from 1 A. Priest, Principles of Public Utility Regulation, p. 51 (1969).

intended to become "used and useful" in the service of the public. PP & L wants to include the loss in its financial picture whereby an increase in rates will eventually pay for the loss, i.e., the loss will be borne by the consumers. PP & L believes this proper inasmuch as service rendered by an electric power utility is limited by the availability of the supply of the product it furnishes. The same can be said of some other utilities. A prudent and reasonable attempt to secure or preserve such supply could well be considered a service rendered on behalf of the consumers.[8] When the life of a utility is limited by such supply, amortization of an entire plant investment has been allowed. *Pennsylvania Power & Light Company v. Pennsylvania Public Utility Commission,* 10 Pa.Cmwlth. 328, 11 A.2d 151 (1973); *Clarksburg Light & Heat Co. v. Public Service Commission,* 84 W.Va. 638, 100 S.E. 551 (1919); *East Ohio Gas Co. v. Public Utilities Commission,* 137 Ohio St. 225, 28 N.E.2d 599 1940). PP & L contends that successful effort in this endeavor would redound to the benefit of the consumers by furnishing a more abundant and cheaper supply of the product and, thus, the failure of the effort should be at the expense of the consumers.

On the other hand, PSC considers the failure of the projects as one of the risks incurred by PP & L when it entered into them. PSC would have the stockholders of PP & L bear the loss since the decision to embark upon the project was made by their representatives who had an opportunity to calculate the risk and to be governed by such calculation. If PP & L gauged the risk with the intention that the loss would be borne by the consumers, there would be no risk at all for PP & L (the stockholders). This fact might encourage PP & L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail and of great gain should the small chance of success occur.

If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are

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[8] It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to insure future supplies.

to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility.

In *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming*, Wyo., 627 P.2d 173, 179 (1981), we said:

> "As pointed out in *Public Service Commission for the State of New York v. Federal Power Commission*, D.C. Cir. 1972, 467 F.2d 361, the primary mission of a regulatory body is to protect the consumer, it must 'strive to reach a balance between consumer, producer, and those whose interests fall in between.' The fixing of just and reasonable rates by the PSC involves a balancing of investor and consumer interests, but a fair return to investors is not necessarily fair to consumers. *Petition of New England Tel. & Tel. Co.*, supra [115 Vt. 494] 66 A.2d [135] at 147."

PSC is not in a position to take on any aspect of utility management. It must restrict its position to "regulation" with management decisions being entirely that of the utility. The difficulty surfaces when it is necessary to distinguish between "regulation" and "management".

Regulation by means of setting rates and determining the factors controlling such by necessity prescribes the "management" domain. Section 37-2-121, W.S.1977, empowers the commission to act when it determines a rate to be "inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential" and it may "fix . . . such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act." PSC has authority to "prescribe and order" changed "any service or service regulation" as it shall determine "to be unjustly discriminatory or unduly preferential", or "any service or facility" found to be inadequate or unsafe," or "any facility or service regulation" found "to be unjust or unreasonable." Section 37-2-122(b), W.S.1977.

"Regulation" also can be said to limit "management" aspects in connection with certain debt acquisitions by utilities.

> "The right of every gas corporation and of every electrical corporation operating as a public utility in the state of Wyoming to issue, assume or guarantee securities and to create liens on its property situated within the state of Wyoming is a special privilege, hereby subjected to the supervision and control of the public service commission of the state of Wyoming, as hereinafter in this act [§§ 37-6-101 to 37-6-107] set forth. Such public utility when authorized by order of the commission and not otherwsie, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen (18) months after the date thereof, for the following purposes: for the acquisition of property; for the construction, completion, extension or improvement of its facilities; for the improvement or maintenance of its service; for the discharge or lawful refunding of its obligation; for the reimbursement of monies actually expended for said purposes from income or from other monies in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five (5) years next prior to the filing of an application with the commission for the required authorization; or for any other purpose approved by the commission." Section 37-6-101, W.S.1977.

Section 37-6-102, W.S.1977, provides that such securities may be issued only after application therefor is filed with the PSC and after a hearing from which the Commission does not find that such

> "transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act [§§ 37-6-101 to 37-6-107]; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility."

And § 37-6-106, W.S.1977, provides that such securities shall be void if "issued, assumed or guaranteed without application to or approval of the commission."

Section 37-3-111, W.S.1977, provides in part that:

> "Every public utility shall file with the commission copies of contracts, agreements or arrangements to which it may be a party, as the commission may designate. . . ."

Section 218 of PSC Rules (1979) requires the filing with it of a copy of all "special contracts which govern the sale by the utility of public utility service or the purchase by the utility of a utility commodity for resale."

It is recognized that the foregoing statutes and rule do not require PSC approval for PP & L's part ownership of the terminated projects. The reference to the statutes and rule is only to exemplify the "management" control by PSC in utility operation. It is a necessary adjunct to "regulation".

Black's Law Dictionary (5th Ed. 1979) defines "regulate" as:

> "To fix, establish, or control; to adjust by rule, method or established mode; to direct by rule or restriction; to subject to governing principles or laws."
>
> ". . . Regulation is an exercise of control while management is an exercise of conduct, in carrying on business. . . ."
>
> *Cloutier v. State Milk Control Board,* 92 N.H. 199, 28 A.2d 554, 558 (1942).
>
> ". . . 'The word "regulate" is one of broad import. . . .'" *Blumenthal v. City of Cheyenne,* 64 Wyo. 75, 186 P.2d 556, 566 (1947), quoting from *City of Ownersboro v. Cumberland Telephone & Telegraph Co.,* 230 U.S. 58, 33 S.Ct. 988, 992, 57 L.Ed. 1389 (1913).
>
> ". . .'The power . . . to "regulate" . . . implies the right to prescribe and enforce all such proper . . . rules and regulations as may be deemed necessary and wholesome in

conducting such business in a proper and orderly manner. *Ogden City v. Leo,* 54 Utah 556, 182 P. 530, 5 A.L.R. 960.' " *Jensen v. Town of Afton,* 59 Wyo. 500, 143 P.2d 190, 201 (1943).

"... prohibit[ing] an incident to or a particular method in connection with business.... is merely regulation. ... regulation necessarily implies restriction in some respects and that that means nothing more or less than a partial prohibition. ... *Steffey v. City of Casper,* Wyo., 357 P.2d 456, 461 (1960).

The PSC is vitally concerned with fixing of rates. If an effort to obtain a new source of energy supply will affect rates—potentially lowering them if successful and potentially raising them if not successful, PSC has the power to control the effect such project will have on rates. This does not mean that it has the power to dictate whether or not the project should be undertaken or to concern itself with other aspects of the conduct relative to the project. The utility need not consult PSC before embarking on the project. However, if the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval is necessary.

In briefs and arguments, the parties make reference to other instances in which PSC has authorized inclusion in the rate base of costs of wells for gas which could turn into dry holes, costs for early retirement of obsolete (for environmental reasons) mechanical flue gas stacks, costs for an abandoned hydro project as a result of federal legislation, etc. Usually the activity which subsequently failed was approved as an activity prior to its inception by the PSC or it consisted of property with a used and useful history.

Although we cannot attribute a consideration by PSC in determining just and reasonable rates of an investment of questionable return in a potential product producing project to (1) the used and useful property or business of the utility, or (2) to an operating expense of it, we do recognize the authority of the PSC to consider such as a part of the "other values of the

. . . system, business . . . of the public utility," § 37-2-122(a), W.S.1977 (see fn. 5), if the consideration, and only if the consideration is given before the investment is made or agreed to be made.[9] The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted—or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success or failure is known. As noted, this consideration and resulting decision will affect a "management" aspect within "regulation," but it is a type of regulation necessary and proper for the exercise of the power and duties of the PSC.

In this instance, the PSC was not consulted prior to the investment about it. It was not necessary to do so. But when the investment failed, the onus of the failure must rest on PP & L, the only one which considered the risk and, therefore, the only one accepting it.

Affirmed as to PP & L and dismissed as moot as to the other appellants. LV's rate applications are to be processed without consideration of its involvement in the projects.

ROSE, Justice, specially concurring.

I concur with the result reached by the majority but do not join in that portion of the opinion which would allow the consumers to bear all costs associated with canceled construction projects so long as the Public Service Commission (PSC) had approved the projects prior to investment by the utility. As I interpret Wyoming's statutory scheme pertaining to the regulation of public utilities, the PSC is without authority to accept or veto *proposed* construction projects for the purpose of

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[9] PP & L's project had a book value as part of its system or business when the investment was made. After it failed, it had no value at all.

shifting their cost to ratepayers. Furthermore, even if the PSC possessed such authority, the ratemaking principles embodies in our statutes do not permit the recovery of costs associated with construction projects which are terminated before ever providing service to utility customers.

I

This court has consistently held that the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any reasonable doubt as to the existence of any power must be resolved against its exercise. *Public Service Commission v. Formal Complaint of WWZ Company,* Wyo., 641 P.2d 183 (1982); *Phillips Petroleum Company v. Public Service Commission,* Wyo., 545 P.2d 1167 (1976); *Tri-County Electric Association, Inc. v. City of Gillette,* Wyo., 525 P.2d 3 (1974).

The general powers of the PSC are set out in § 37-2-112, W.S.1977:

> "The commission shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act."

This statute, as the majority recognize, empowers the PSC to regulate and supervise utilities, not to manage[10] them. Regulation and supervision, however, necessarily entail control over the *effects* of decisions made by those who manage public utilities.

The position advocated by the majority would extend the PSC's sphere of control to cover not only the effects of managerial decisions but the decision-making process itself. In support of their position, the majority cite and discuss a number of provisions in our regulatory scheme as illustrative of the degree of control that the PSC exerts over management as a necessary adjunct to regulation. These statutes, in my judg-

[10] The American Heritage Dictionary defines "manage" to mean: "To direct or administer (the affairs of an organization, estate, household, or business)."

ment, emphasize the supervisory or watchdog function of the PSC in protecting the public interest. Section 37-2-122, W.S.1977, authorizes the PSC to eliminate existing services, facilities, and regulations which are inadequate, unsafe, unjust, or unreasonable. Section 37-6-101, W.S.1977, empowers the PSC to supervise the issuance of securities and the creation of liens, activities which are regulated in competitive as well as monopolistic enterprises in order to protect the public investor. Section 37-6-102, W.S.1977, *mandates* PSC approval of proposed securities transactions unless such transactions are inconsistent with the public interest, unlawful, or exceed the assets of the utility. Finally, § 37-3-111, W.S.1977 and PSC Rule 218 require public utilities to file designated contracts in order to keep the PSC informed.

Clearly, these statutes authorize the PSC, in obeying its charge to guard the public interest, to monitor the business decisions previously made by utility executives. Using these statutes as a foothold, however, the majority make what I consider to be a monumentally faulty and frighteningly unjustified logic-leap to the conclusion that the PSC has the authority to rule on the viability of proposed utility projects with respect to whether consumers will bear the risk of failure. To deny that such authority would encompass the power to dictate whether a particular project should be undertaken is to deny reality. Utility executives would be compelled to consult the PSC and obtain approval before embarking on any project, or face possible stockholder suits for mismanagement in the event the project fails. The PSC would, in effect, be making crucial decisions concerning utility proposals—all in the name of regulation and, with all due respect to our Public Service Commission and its able membership, the PSC is not required to be qualified and probably is not qualified to make such delicate and technical public utility decisions.

The function of the PSC is to protect the consumer through the regulation of public utilities, while taking into consideration the legitimate interests of the utilities. *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming,* Wyo., 627 P.2d 173 (1981). In carrying out this function, the

PSC is empowered to control the effect that new energy projects will have on rates—but only after the utility management has assessed the merits and drawbacks of the proposal and reached a final decision based on sound business judgment, and only after the project has become used and useful in providing energy. It is not the function of the PSC to provide an insurance policy under which the ratepayers will protect the investments of utility stockholders against all risks. This court recognized as much in *McCulloch Gas Transmission Company v. Public Service Commission of Wyoming,* supra, 627 P.2d at 179, where we described the regulatory function of the PSC and said:

> ". . . The public interest is to be given paramount consideration; desires of a utility are secondary. *Big Horn Rural Electric Co. v. Pacific Power & Light Co.,* Wyo. 1964, 397 P.2d 455. The purpose of the PSC's authority is to protect the public from utilities affected with a public interest."

Not only is the participation by a state agency in a utility's business decisions unnecessary to regulation, it is impermissible. The United States Supreme Court in *State of Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri,* 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, 985 (1923), said:

> ". . . It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company,* 291 Ill. 209, 234 [125 N.E. 891].
>
> " '*The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation . . .*' " (Emphasis added.)

The proper relationship between regulators and regulated enterprises was described by 1 Priest, Principles of Public Utility Regulation, p. 23:

> "Where inefficiency or improvidence or economic waste or abuse of discretion or action inimical to the public interest have been demonstrated, the agency having jurisdiction may intervene. Business decisions are, however, the prerogative of management. Regulators are not the masters of public utility enterprises. They may, and often should, breathe down the executive's neck, but the basic responsibility is his, not theirs."

The majority opinion would permit utility companies to recover their investments in terminated construction projects, ineligible for inclusion in rate base or operation expenses, if the approval is first submitted to the PSC for approval. I conclude that the exercise of such power by the PSC would exceed the scope of the enabling statutes and implicate constitutional proscriptions concerning private property.

II

The majority conclude, and I agree, that Pacific Power & Light Company's capital investment in the now terminated nuclear plants cannot properly be included in the rate base as used and useful property or be amortized as an operating expense. However, the majority would permit the PSC, in determining just and reasonable rates, to consider the costs associated with such investments under the "other values" language of § 37-2-122(a), W.S.1977. That statute provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

Under this statute, the decisive question is whether "an investment of questionable return in a potential product producing project" (majority opinion 677 P.2d at 808) is one of the "other values of the plant, system, business and properties of

the public utility," which may properly be considered for ratemaking purposes. I conclude that it is not, because to allow the PSC to consider the value of a contruction project which ultimately fails is to circumvent the used and useful principle of § 37-2-119, W.S.1977.[11] I would interpret the physical and other—presumably non-physical—values specified in § 37-2-122(a), supra as encompassing only the values of those items properly includable in the rate base. That is, § 37-2-122(a) empowers the PSC to consider for ratemaking purposes only the property and business of the public utility which is used and useful in producing the product. I cannot attribute to the legislature the intent to embody in the ratemaking formula both the used and useful principle and the means to annihilate that principle.[12]

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[11] Section 37-2-119, W.S.1977, provides as follows:

"In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value, the operating statistics for any public utility both as to revenues and expenses and as to the physical features of operation in such detail as the commission may deem advisable; the earnings, investment and expenditures of any such corporation as a whole within this state, and as to rates in local exchanges or plants of any telephone, telegraph, water, electrical or gas corporations, the geographical location thereof shall be considered as well as the population of the municipality in which such plant or exchange is located."

[12] *See Office of Consumers' Counsel v. Public Utilities Commission,* 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), where the Ohio Supreme Court refused to interpret a catchall statute so as to permit the commission to consider the utility's investment in four terminated nuclear power plants as amortizable costs. The court said:

". . . The commission views [the pertinent statute] as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly, first because the provisions are linked inextricably with the ratemaking factors contained in [the statute specifying permissible considerations in ratesetting proceedings], and secondly because the General Assembly undoubtedly did not intend to build into its recently revised (1976) ratemaking formula a means by which the commission may effortlessly abrogate that very formula." 423 N.E.2d at 828.

The majority cite several instances in which the PSC has considered for ratemaking purposes the costs of projects not currently useful in supplying the product. Such consideration was permissible, according to the majority, since the terminated activity had received the price approval of the PSC or had a used and useful history. I would have held that our statutory scheme, including the used and useful principle, contemplates the consideration of the costs attributable to the cited projects, without expanding the meaning of the "other values" language of § 37-2122(a) and notwithstanding a lack of price approval by the PSC.

Pursuant to § 37-2-122(a), supra, obsolescence of previously useful equipment is a proper factor to be considered in setting just and reasonable rates. The cost of drilling a dry gas well is properly categorized as an operating expense, since gas, unlike electricity, is a commodity for which the utility must search in order to provide service. The search for gas necessarily includes the drilling of a certain percentage of dry holes, whereas the production of electricity does not necessarily include the building of a certain percentage of defunct plants. I agree with the pronouncement of the Ohio Supreme Court in *East Ohio Gas Co. v. Public Utilities Commission,* 137 Ohio St. 225, 28 N.E.2d 599, 609 (1940), concerning the propriety of considering the cost of gas leaseholds which turn out to be unproductive.

> "It must be apparent that the cost of acquiring, holding for a time during which delay rentals must be paid, testing and finally cancelling unproductive acres is the only method by which productive gas acres can be found and developed, and it is equally apparent that this expense must be borne by the consumer who ultimately uses the gas from the productive acres."

It is not necessary to expand our existing statutory scheme in order to justify the recovery of these types of costs through rates.

I conclude that the statutory formula for setting just and reasonable rates does not permit the consideration of utility

investments which are not attributable to the rate base and which are not properly designated as costs of operation. I would adopt the position reiterated by the Ohio Supreme Court when faced with a question of statutory interpretation under circumstances similar to the instant case:

> " . . . ' . . . . It is only proper that their [the investors] venture be found operational before they commence to recoup their capital outlays from the consumers' . . ." *Office of Consumers' Counsel v. Public Utilities Commission,* 67 Ohio St. 2d 153, 423 N.E.2d 820, 829 (1981), quoting from *Office of Consumers' Counsel v. Public Utilities Commission,* 58 Ohio St. 2d 449, 456-457, 391 N.E.2d 311 (1979).

THOMAS, Justice, dissenting.

I must dissent in part from the decision reached by the majority of the court in this case. I am in accord that the case must be dismissed as to Lower Valley Power & Light, Inc., Chemical Bank and Washington Public Power Supply System because it is moot. With respect to Pacific Power & Light Company, however, I would hold that the Public Service Commission had no authority to enter the order which it entered, and I would remand the case with directions that it be dismissed.

The remarkable thing in connection with the disposition of this case by this court is that the majority opinion and the concurring opinion refer to and discuss the correct legal propositions, but they apply them in an erroneous manner. In Justice Rose's special concurring opinion he very ably articulates the proposition that the Public Service Commission has only that power and authority granted to it by the Wyoming Constitution and statutes, and that the statutory powers must be strictly construed. There is no need to again cite the authorities which encompass those holdings. At page 808 of the majority slip opinion the court aptly says:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP & L's part ownership of the terminated projects."

The document which initiated Pacific Power & Light Company's involvement in this proceeding was a notice and order setting hearing which was entered on April 22, 1982, and that document did not reflect the justification for the investigation by the Public Service Commission. It is clear, however, that the commission did proceed pursuant to § 37-2-117, W.S. 1977, which provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility *should be made in order to secure compliance with the provisions of this act and orders of the commission,* it may of its own motion summarily investigate the same." (Emphasis added.)

While I might rely simply upon the concession in the majority opinion to the effect that no investigation was needed to secure compliance with the provisions of the act or the orders of the commission, I will point out that this record and the arguments of counsel for the commission are devoid of any reference to any statute or order of the commission with which compliance by Pacific Power & Light Company needed it be secured. I am prepared to concede that the commission might investigate in order to determine if such a situation existed, but once it determined that there was no justification for the investigation I cannot perceive any authority which would permit the Public Service Commission to enter the order that it did in this instance.

I recognize that it is popular to ride on the judicial steam roller which has flattened Washington Public Power Supply System. While I might be in sympathy with the result which the Public Service Commission and this court reaches, I find I have no empathy for what I believe to be an abuse of the commission's authority which this court has sustained.

I understand that the Public Service Commission has told Pacific Power & Light Company that if Pacific Power & Light Company should wish to include its investment costs in these abandoned nuclear power plants in any future rate to be

applied to Wyoming consumers that the Public Service Commission of Wyoming will not permit that. Purely and simply that is an advisory order from the Public Service Commission, and our statutory scheme does not justify such an approach. This court has said that it does not render advisory opinions, and we dismiss cases in which an advisory opinion is sought. *Aetna Casualty and Surety Company v. Langdon,* Wyo., 624 P.2d 240 (1981); *Kwallek v. State,* Wyo., 596 P.2d 318 (1976); *Police Protective Association of Casper v. City of Casper,* Wyo., 575 P.2d 1146 (1978); *State v. Rosachi,* Wyo., 549 P.2d 318 (1976); *Knudson v. Hilzer,* Wyo., 551 P.2d 680 (1976); and *Tobin v. Pursel,* Wyo., 539 P.2d 361 (1975). In part the fact that this court does eschew advisory opinions is premised upon the proposition that there is no way in which the judgment which is rendered may be carried into effect. Perhaps the result is to make the case moot as discussed on page 802 of the majority slip opinion. The point, however, is that the Public Service Commission, without statutory authority, does not have any business entering an order such as this; and yet, by affirming what the Public Service Commission has done, this court has, in effect, and contrary to a longstanding jurisprudential discipline, joined in an advisory opinion. No matter how much the parties want an answer to this question we should not so casually abandon that rule of jurisprudence.

As indicated, I would reverse the order of the Public Service Commission because this court has the duty to hold unlawful and set aside agency action which is in excess of statutory authority. Section 16-3-114(c)(ii), W.S. 1977 (Oct. 1982 Rev.).

APPENDIX I

105 Idaho 432, 670 P. 2d 839

Gary ASSON and LeRae Asson, husband and wife, citizens of the City of Burley; Ransom H. Brown and Betty Brown, husband and wife, citizens of the City of Heyburn; and J.R. Simplot Company,

Petitioners,

v.

CITY OF BURLEY; Charles Shadduck, Mayor of the City of Burley; James Parker, J. Garth Payne, Frances McDonald, Dale Doman, Walter Petersen, and Truman Bradley, as members of the City Council of Burley; City of Heyburn, Harold R. Hurst, Mayor of the City of Heyburn; and Wilford Wilcox, Dean Baker, David Mayes, and Larry McComb, as members of the City Council of Heyburn,

Respondents.

Richard H. BOHLE and Paula L. Bohle, husband and wife; Blaine Jensen and Lillian D. Jensen, husband and wife; Charles B. Park and Billie F. Park, husband and wife; Clarence F. Bellem and Lillian B. Bellem, husband and wife; Magic Valley Foods, Inc., an Idaho corporation; Cameron Sales, Inc., an Idaho corporation,

Petitioners,

v.

CITY OF RUPERT, William F. Whittom, Mayor of the City of Rupert, Clark Cameron, Dwinelle E. Allred, June Dombeck and Ronald E. Klebe, as members of the City Council of Rupert.

Respondents.

Nos. 14719, 14809
Supreme Court of Idaho.
Sept. 26, 1983.
Rehearing Denied Nov. 4, 1983.

Alternative writ of prohibition made permanent.

Bakes, J. filed a dissenting opinion.

Craig Meadows and Phillip M. Barber of Boise, for petitioners Asson, et al.

Roger D. Ling of Rupert for petitioners Bohle, et al.

William Parsons of Burley for respondent City of Burley. Stephen A. Tuft of Burley for respondent City of Heyburn.

Donald J. Chisholm of Burley for respondent City of Rupert.

A. L. Smith of Idaho Falls for intervenor City of Idaho Falls.

Peter B. Wilson of Bonners Ferry for intervenor City of Bonners Ferry.

R. B. Kading, Jr., and R. M. Turnbow, of Boise, for intervenor Washington Public Power Supply System.

Howard Humphrey, and Stanley Welsh, of Boise, for intervenor Chemical Bank.

HUNTLEY, Justice.

In 1976, five Idaho cities[1] (parties to this action) entered into an agreement with the Washington Public Power Supply System (WPPSS) for future supplies of electrical energy to be generated by two planned nuclear power plants. Although the plant projects were later terminated, under the terms of the agreement the cities were nevertheless required to continue to pay their percentage shares of the bond obligations incurred, amounting to millions of dollars. Residents and purchasers of electricity of three of the five cities brought this petition for a writ of prohibition, pursuant to this Court's authority under Idaho Const. Art. 5 § 9 and I.C. §§ 7-401, 402, to prevent the respondent cities from raising municipal electric rates to cover their payment obligations. The petitioners allege the cities acted without constitutional authority when entering into the 1976 agreements.

The record shows that each of the five Idaho cities owns and operates an electrical distribution system that carries electricity within the city and to nearby areas.[2] However, only two of the cities have generating facilities (Idaho Falls and Bonners Ferry), and those facilities do not supply all of their power needs. Thus, each of the five cities relies on outside electrical power supplies. Since 1963 (and before, for several cities) the outside supplier has been the federal government, through its agency the Bonneville Power Administration (BPA). The BPA provides the Pacific Northwest region with comparatively inexpensive hydroelectric power generated at facilities along the Columbia River system.

In the late 1950's and early 1960's Pacific Northwest cities were receiving forecasts of greatly increased future energy demands. It was expected that the Northwest's hydroelectric resources would soon be inadequate to meet the needs of the region's power users. During this period, and through the late 1960's and into the 1970's, cooperative efforts were made by electricity purchasers such as municipalities and utility districts to predict the region's future energy needs and to make plans to meet them. Organizations such as the Public Power Council

[1] Burley, Rupert, Heyburn, Idaho Falls and Bonners Ferry (the latter two are in the suit as intervenors).

[2] The essential facts were submitted by stipulation of all parties.

and the Pacific Northwest Utilities Conference Committee involved utilities in the region in energy forecasting and planning activities.[3] Another organization, the Joint Power Planning Council, including BPA and many of its power customers, made a study of future energy requirements and concluded that new electrical generating plants would have to be built to keep pace with increasing power demands. A plan was developed which called for the construction of several thermal power plants.

In January 1971 and 1973, and September 1973, the five Idaho cities, together with other Pacific Northwest utilities, entered into agreements with WPPSS to purchase electrical "project capability" from three nuclear power plants to be constructed by WPPSS.[4] Financing for the three nuclear plants was arranged under a plan called "net billing." The cities were to purchase shares of project capability from WPPSS, payment for which was to be made out of city utility revenues. The cities would then assign their project capability to BPA, which would reimburse the cities by reducing their wholesale power bills in amounts equal to their payments to WPPSS. In this way, BPA would actually fund the WPPSS projects.[5]

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[3] The Pacific Northwest Utilities Conference Committee was comprised of 130 public and private utilities in the region. Each year it published the "West Group Forecast," a compilation of forecasts of "load growth" from each of the utilities in the region. Those forecasts supported predictions of power shortages by the 1980's.

[4] WPPSS is a municipal corporation and joint operating agency authorized under Washington state laws to finance, construct, own and operate electrical generating facilities. It was established in 1957 and is composed of 19 public utility districts and four Washington cities. "Project capability" which the utilities contracted to purchase from WPPSS is a percentage share of the potential output of nuclear plants to be constructed. In the agreement it is defined as follows:

> "the amounts of electric power and energy, *if any,* which the projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part of any reason whatsoever), less Project station uses and losses." (Emphasis added.)

[5] The participants would pay debt service on the bonds through their monthly payments to WPPSS, and BPA would, in effect, reimburse the participants.

Each city entered into the agreement with respect to these first three plants (referred to as Projects 1, 2, and 3) after passage by its city council of a resolution authorizing execution of the agreement. Each city also represented, in the form of an opinion letter from its counsel, that it had authority to enter into the agreements.[6] The cities had specified statutory authorization, by means of a provision enacted in 1971, to participate in a net-billing arrangement and purchase electrical power to be resold to BPA:

> **"I.C. § 50-342. Electric Power—Purchase or disposal.**—In addition to the power otherwise conferred on cities of this state, a city owning and operating an electric distribution system shall have the authority to purchase electric power and energy for the purpose of disposing of such power and energy to the United States of America, department of the interior, acting by and through the Bonneville power administrator, through exchange, net billing or any arrangement which is used for supplying the needs of the city for electric power or energy, and such authority shall not be subject to the requirements, limitations, or procedures contained in sections 50-325 and 50-327, Idaho Code." [7]

The net-billing financing plan made it possible for BPA to assist in insuring future supplies for its electricity customers. Each participating utility pays WPPSS its share of the costs of developing the projects, and BPA gives the participant a credit in the amount of such payment on the BPA bill for power purchased by the participant.

In December 1973 the Public Power Council investigated the possibility of two additional power plants to be designed, financed and built by WPPSS. For various reasons (one of which was a 1973 Treasury Department ruling denying tax exempt status for bonds to finance additional thermal plants from which BPA would receive more than 25% of the energy

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[6] Each city received a form opinion letter from WPPSS which it was required to follow in stating its authorization, as a prerequisite to entering into the agreement.

[7] J.C. §§ 50-325 and 50-327, would have prevented sale of electrical power to BPA by the cities unless it was excess power. J.C. § 50-342 removed that limitation. The section was amended in 1981 and 1982.

output), the two newest plants (Projects 4 and 5) could not be financed under the same arrangements as Projects 1, 2 and 3, which had BPA involvement. During 1974 and the first half of 1975, the Public Power Council, BPA, WPPSS and various utilities discussed possible financing plans for Projects 4 and 5.

Although three nuclear plants were already being built, many Northwest utilities were still convinced that the future would bring energy demands well beyond the output of existing and planned power plants. BPA customers were made aware of a possible "notice of insufficiency" in 1973 and thereafter. The "notice of insufficiency" was an official statement by BPA to its preference customers that it would not be able to supply them with sufficient electricity by the early 1980's. BPA informed its customers that unless a plan were created to provide for future power production it would be forced to issue its notice of insufficiency.[8]

The proposed additional nuclear plants were to be located at the same sites as Projects 1 and 3 to reduce costs. Costs were projected to be low in comparison to other alternative power facilities. Impelled by the region's forecasts of energy shortages and the apparent advantageous circumstances of pairing two new plants with projects already under construction, the cities entered into a second set of agreements with WPPSS in July 1976.

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[8] The notice of insufficiency was finally issued in June, 1976. BPA's letter to the cities stated, in part:

> "Bonneville has completed an analysis of the resources it estimates will be available for disposition and its requirements and commitments to supply firm energy in the year July 1, 1983, to June 30, 1984. As a result of this analysis, Bonneville has determined that the firm energy resources available to it will be insufficient in that year to supply in full the City's firm energy requirements, the firm energy requirements of other preference customers, and Bonneville's obligations to deliver firm energy to its other customers.
>
> Therefore, in accordance with the provisions of the Power Sales Contract, I hereby give notice, effective at 2400 hours on June 30, 1976, that in the year beginning July 1, 1983, and in each year thereafter during the term of the Power Sales Contract, Bonneville's obligation to supply firm energy to the City will be limited to an allocation, the amount of which will be computed according to the terms of Section 22 of the General Contract Provisions."

The agreements, in summary form, provided that WPPSS would use its best efforts to arrange financing for the two plants, to obtain regulatory permits, to issue and sell bonds, and to complete planning and engineering studies, arrange for construction and timely completion of the plants, and thereafter maintain the plants. Project 4 was to be completed in March 1982, and Project 5 in April 1984. If WPPSS failed to secure financing, or if the plants were not complete as planned, the participating cities were nevertheless bound to pay their obligations. The agreement provided:

> "The Participant shall make the payments to be made to Supply System [WPPSS] under this Agreement whether or not any of the Projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either Project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon performance or nonperformance by Supply System or by any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other [sic] legal or equitable remedy." [9]

The payment obligation of each city was based on its percentage share of the project capability purchased. The city pays its percentage of the projects' annual budget and fuel costs, including all of WPPSS' cost of ownership, debt service on bonds, and all other costs. The cities' obligation to pay was to begin on the earliest of three dates: (1) continuous operation of any plant; (2) July 1, 1988; or (3) one year after termination of any project.

Projects 4 and 5 were terminated in January 1982 when WPPSS was unable to secure sufficient financing to complete the plants. At the time, Project 4 was approximately 20% complete and Project 5 was approximately 16% complete.[10]

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[9] Section 6(d), p. 19 of the agreement, referred to as the "hell or high water clause."

[10] The WPPSS Board of Directors and Executive Board terminated the projects by adoption of Resolutions no. 1203 and no. 34,

(footnote continues)

Bonds had been issued by WPPSS in the amount of $2.25 billion.[11]

Under the agreement, the cities' payment obligations are limited to revenues derived from the operation of their utility systems. Each participant agrees to establish, maintain and collect electrical charges adequate to cover its payment obligations. In the event a participant defaults, provision is made for the non-defaulting participants to assume payment of the defaulter's obligation, up to a maximum of 25% of their own obligations.

As they had done with Projects 1, 2 and 3, the cities submitted opinion letters stating they were authorized by law to enter into the Project 4 and 5 agreements. Although the two sets of agreements were essentially the same (both involved the purchase of project capability, under the same terms, and both contained the so-called "dry-hole liability" provision), the financing arrangements were different in one important aspect—involvement of BPA. In the Project 4 and 5 agreements, the cities are ultimately liable for the "dry-hole" risk, whereas in the earlier agreements the cities incur no expense for which they do not obtain electrical power in like amount from BPA. In that sense, the Project 1, 2 and 3 agreements were similar to power purchase contracts. The cities received electricity in proportion to their payments to WPPSS.

Petitioners allege the cities acted in violation of the Idaho Constitution, Art. 8, §§ 3 and 4, and Art. 12, § 4, when they entered into the Project 4 and 5 agreements. Since our analysis of the applicability of Art. 8, § 3 is dispositive of the case, we need not address the other constitutional provisions. Art. 8, § 3 states:

> **"Limitations on county and municipal indebtedness**—*No* county, *city,* board of education, or school district, or other subdivision of the state, *shall incur any*

(footnote continued)

giving as the reason WPPSS' inability to proceed due to financing conditions beyond its control.

[11] Each city's share of the principal amount of the bonds sold is as follows: Burley, $4.275 million; Rupert $7.290 million; Heyburn, $5.782 million; Idaho Falls, $20.587 million; Bonners Ferry, $4.275 million.

indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state and provided further than any city may own, purchase, construct, extend, or equip, within and without the corporate limits of such city, off street parking facilities, public recreation facilities, and air navigation facilities, and for the purpose of paying the cost thereof may, without regard to any limitation herein imposed, with the assent of two thirds (⅔) of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by, such facilities as may be prescribed by law, and provided further, that any city or other political subdivision of the state may own, purchase, construct, extend, or equip, within and without the corporate limits of such city or political subdivision, water systems, sewage collection systems, water treatment plants, sewage treatment plants, and may rehabilitate existing electrical generating facilities, and for the purpose of paying the cost thereof, may, without regard to any limitation herein imposed, with the assent of a majority of the qualified electors voting at an election to be held for that purpose, issue revenue bonds therefor, the principal and interest of which to be paid solely from revenue derived from rates and charges for the use of, and the service rendered by such systems, plants and facilities, as may be prescribed by law; and provided further that any port district, for the purpose of carrying into effect all or any of the powers now or hereafter granted to port districts by the laws of this

> state, may contract indebtedness and issue revenue bonds evidencing such indebtedness, without the necessity of the voters of the port district authorizing the same, such revenue bonds to be payable solely from all or such part of the revenues of the port district derived from any source whatsoever excepting only those revenues derived from ad valorem taxes, as the port commission thereof may determine, and such revenue bonds not to be in any manner or to any extent a general obligation of the port district issuing the same, nor a charge upon the ad valorem tax revenue of such port district." (Emphasis added.)

Since it is admitted that no election was held by any of the five cities to obtain approval of the electorate prior to entering into the agreements in question, petitioners contend the cities contracted indebtedness in violation of the Idaho Constitution, and their indebtedness or liability is therefore void. Respondent City of Heyburn and intervenors WPPSS and Chemical Bank[12] argue, however, that Art. 8, § 3 does not apply to the financing arrangement in this case because that provision contemplates an indebtedness for which taxes would need to be assessed, and the cities' payment obligations here are to be satisfied out of utility revenues alone.

Such an interpretation, however, would ignore the plain language of the constitutional provision, which states that "[n]o . . . city . . . shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (⅔) of the qualified electors thereof. . . ." While it is true that the provision goes on to add another requirement, relating to the collection of an annual tax to pay interest on the debt and a sinking fund to pay the principal, the latter requirement is simply sound fiscal policy and does not relate to the primary constitutional mandate of electorate approval of substantial and far-reaching municipal indebtedness. A financing plan which provides for amortization of the indebtedness by some means other than assessment of taxes might be held to satisfy that part of Art. 8, § 3 which calls

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[12] Chemical Bank, a New York corporation, is trustee for the holders of bonds issued by WPPSS to finance construction of Projects 4 and 5.

for an assessment, but it cannot fulfill the requirement of voter approval.

City of Heyburn, WPPSS and Chemical Bank also contend that Art. 8, § 3 would be inapplicable under the rule distinguishing municipal indebtedness from "special fund" indebtedness.

It is urged that we overrule *Feil v. City of Coeur d'Alene,* 23 Idaho 32, 129 P. 643 (1912), and apply the "special fund" doctrine in this case. That doctrine, accepted by a great majority of cases,[13] holds that a municipality does not contract indebtedness or incur liability, within the constitutional limitation, by undertaking an obligation which is to be paid out of a special fund consisting entirely of revenue or income from the property purchased or constructed. *Feil* dealt with a decision by the city of Coeur d'Alene to purchase a municipal water system, to be financed by bonds which would be repaid out of a fund containing only the revenues derived from operation of the water works. It was argued that since no indebtedness was contracted by the city itself—but rather only by the bond fund—the expenditure did not come under Idaho Const. Art. 8, § 3. The *Feil* court rejected that argument, reasoning that Idaho's expansive constitutional provision (which, unlike several other states' examined by the court, contained the word "liability" as well as "debt") included an indebtedness paid out of a fund separate from the city's general fund. The court was critical of "subtleties and refinements of reasoning" utilized to suggest that no liability is incurred where a special fund is involved. 23 Idaho at 49, 129 P. at 649. Since *Feil,* a series of cases have declined to apply the special fund doctrine. *See, Boise Development Co. v. Boise City,* 26 Idaho 347, 143 P. 531 (1914); *Miller v. City of Buhl,* 48 Idaho 668, 284 P. 843 (1930); *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931); *Straughn v. City of Coeur d'Alene,* 53 Idaho 494, 24 P.2d 321 (1932); *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956).

However, *Feil* and its quite extensive succession of authority no longer prevent application of the special fund exception

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[13] For a list of other jurisdictions applying the special fund doctrine, see Moore, Constitutional Debt Limitations on Local Governments in Idaho—Article 8, Section 3, Idaho Constitution. 17 Idaho L. Rev. 55, 65 n. 50 (1980).

because that exception has been made a part of Idaho law by way of amendments to Art. 8, § 3. *See, Idaho Water Resource Board v. Kramer,* 97 Idaho 535, 548 P.2d 35 (1976).[14] The first such amendment, passed in 1950, authorized cities to purchase or construct water and sewage systems, treatment plants, and off-street parking facilities to be financed by bonds, "the principal and interest of which to be paid solely from revenue derived from rates and charges for the use, and the services rendered by, such systems, plants and facilities . . ." Subsequent amendments have increased the scope of the special fund exception to include port districts (1964), public recreation facilities (1966), air navigation facilities (1968), and rehabilitation of existing electrical generating facilities (1976). We note that, with the exception of port districts, indebtedness of a city for any of the purposes listed, even though not subject to the tax assessment provision of Art. 8, § 3, is nevertheless specifically conditioned on voter approval. The intent of the framers of the constitutional amendments, and the electorate through their ratification, is clear that approval of a municipality's qualified voters is necessary whether its Art. 8, § 3 indebtedness or liability is against the general fund of the city, and its tax revenues, or limited to a special fund of project-generated revenues.

It might be argued that since Art. 8, § 3 provides for "rehabilitation of existing electrical generating facilities" and makes no mention of construction of new facilities or indirect financing of new facilities through purchase of project capability, the latter purposes are not covered by the requirements of that section. However, it seems unreasonable to believe that the framers and ratifiers of the amendments intended for a city to obtain assent from a majority of its qualified voters to rehabilitate or repair its electrical plant and yet not obtain voter approval of the financing of completely new generating facilities, at perhaps several times the cost.

The better view is that the constitutional provision requires a city to obtain only a simple "majority" voter approval where

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[14] The court stated, "furthermore any doubt as to the precedential value of the *Feil* opinion has been removed by subsequent amendments by the people of this state to Art. VIII, § 3, which now authorizes a municipality to do what was impermissible at the time the case was decided," citing to *Schmidt v. Village of Kimberly,* 74 Idaho 48, 256 P.2d 515 (1953). 97 Idaho at 558, 548 P.2d at 58.

the indebtedness undertaken is only for the rehabilitation of existing facilities (a purpose more similar to the "ordinary and necessary expenses" exception), whereas if the indebtedness is for the construction of wholly new facilities (obviously a much more extensive undertaking), then the "two thirds (⅔)" majority approval within the general application of the article would apply. This interpretation is substantiated by the 1972 amendment which divided the special fund exceptions into two groups: those requiring two-thirds voter approval and those requiring only a simple majority.[15] When the provision covering the rehabilitation of existing electrical generating facilities was added in 1976, it was placed within the second group.

Reasoning *a fortiori*, we cannot conceive of an interpretation of Art. 8, § 3 which would sanction the extensive, long-term indebtedness undertaken by the cities herein without an election.[16] Art. 8, § 3, if it has application to a city's issue of bonds to finance rehabilitation of its electrical generating facilities, surely applies to a city's guaranty of bonds issued to construct two new nuclear power plants.

Thus, were we to accept the argument that the cities' liability comes under the special fund doctrine, the indebtedness would still be without constitutional authority because Art. 8, § 3, requires voter approval of qualifying indebtedness regardless of the method or source of repayment. However, we do not believe the special fund exception is applicable here. The special fund doctrine is normally applied

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[15] H.J.R. No. 73, 1972 Idaho Sess. Laws p. 1251.

[16] The amortized monthly cost of each city's share of the $2.25 billion bond obligation, over 30 years, is:

Burley, $29,752.00 per month,
Rupert, $50,735.00 per month,
Heyburn, $40,244.00 per month,
Idaho Falls, $143,279.00 per month,
Bonners Ferry, $29,752.00 per month.

Simple mathematics reveals overall indebtedness ranging from a low of $10,710,720.00 for Burley and Bonners Ferry, to a high of $51,580,440.00 for Idaho Falls. It is unthinkable to suggest that a constitutional provision intended to require voter approval of any debt which exceeded the income provided for it during one year does not apply to a $10.7 million debt for a city of 1,906 people (Bonners Ferry, 1980 census).

in situations where the city's indebtedness is for the purpose of building or buying revenue-producing property, and only the revenue produced from that particular property is used to repay the indebtedness. For example, a city might issue bonds to fund construction of a power generating station, the bonds being repayable from income generated by the power station. Such financial undertakings might be said to "pay for themselves," leaving no possibility of obligation on the city's general fund (requiring replacement by additional taxation). In the present case, the cities' obligation to pay off the WPPSS bonds has created no revenue-producing property. The cities receive no electrical power for their monthly payments to WPPSS, and must raise their rate charges on power they already purchased to create a fund out of which to pay WPPSS. In essence, they must impose a surcharge on their rate-paying residents and other electrical power users, for which they provide no additional service.[17] Indeed, far from qualifying as a special fund exception, this indebtedness might constitute a general obligation on the city for which it has nothing to show.[18]

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[17] To the extent this surcharge imposes an obligation on the rate-payer unrelated to the quantity of electricity used, it could constitute a tax. Supposing the extremely unlikely situation of there being only one rate-payer in the municipality, or of the whole group of rate-payers passing a month without using any electricity, under the terms of its agreement with WPPSS, the city would be compelled to charge a "rate" sufficient to make its monthly payment to WPPSS no matter how unreasonable it would be as to the single rate-payer, or in spite of the fact that no service was provided. The supposition may be fanciful, but it serves to illustrate the nature of the revenues collected by the city; they are not properly "utility revenues." *See,* 12 McQuillin, *Municipal Corporations* § 35.38 (1970).

[18] In light of the contractual requirment that non-defaulting participants assume the burden of paying a defaulting participant's share (up to 25% of their individual shares), there arises the question of a defaulting municipality's liability to its fellow participants, which may elect to sue it. They would not be bound as WPPSS is to recovery only against the special fund, the agreement providing:

> "If the Participant shall fail or refuse to pay any amounts due to Supply System hereunder, the fact that other Participants have assumed the obligation to make such payments shall not relieve the Participant of its liability for such payments, and the Participants assuming such obligation, either individually or as a member of a group, shall have a right to recovery from the Participant. Supply System or any Participant as their interests

(footnote continues)

We now address the contention of WPPSS, Chemical Bank, and the City of Heyburn that the cities' indebtedness is excepted from the requirements of Idaho Const. Art. 8, § 3 by virtue of its being an "ordinary and necessary" expense. That proviso reads as follows: "Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . ." In our interpretation of this language, we are benefitted by a rather extensive history of case law. We note at the outset that this proviso consists of two requirements: (1) that the expense be ordinary and necessary, and (2) that it be authorized by the general laws of the state. *City of Pocatello v. Peterson* 93 Idaho 774, 777, 473 P.2d 644, 647 (1970). We will address the "ordinary and necessary" requirement first.

Early cases interpreted the "ordinary and necessary" language very narrowly. The court often looked to the amount of the expense in proportion to the city or county's revenue for that year. In *County of Ada v. Bulien Bridge Co.*, 5 Idaho 79, 47 P. 818 (1896), the court stated.

> "If it is claimed that this expenditure comes within the proviso of section 3, article 8, of the constitution, we answer that a construction of that proviso, as well as of the entire section, was given by this court in *Bannock Co. v. Bunting*, 4 Idaho, 156, 37 Pac. 277, and we would suggest that an improvement involving an expenditure of nearly $40,000, where the revenue of the county for the year was only about $70,000, would not readily be classed as an 'ordinary and necessary expense.' It would be difficult, we apprehend, to name an expense under such a construction that would not be 'ordinary and necessary.' If a necessity

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(footnote continued)

> may appear, jointly or severally, may commence such suits, actions or proceedings, at law or in equity, including suits for specific performance, as may be necessary or appropriate to enforce the obligations of this Agreement against Participants, which obligations shall include reasonable attorneys' fees in all trial and appellate courts." Section 17(e), pp. 48-9.

If other participants, either individually or as a group, bring an action against a defaulting municipality, a judgment obtained in the action would be assessed against the city (as opposed to its utility service, or revenues therefrom) as the contracting entity, and recoverable from the city's general fund.

> existed for the bridge, there was no conceivable excuse for not complying with the plainly expressed provisions of the constitution and the statutes. If these provisions of law are to be ignored or defeated upon flimsy technicalities, it is difficult to see what protection the people will have." *Id* at 90, 47 P. at 823.[19]

See also, Ball v. Bannock Co., Idaho 602, 51 P. 454 (1897). Expenditures held *not* to be ordinary and necessary include: the construction of bridges, *Bullen Bridge, Dunbar, supra;* construction of a wagon road, *McNutt v. Lembi Co.,* 12 Idaho 63, 84 P. 1054 (1906); purchase of a water system, *Woodward v. City of Grangeville,* 13 Idaho 652, 92 P. 840 (1907); construction of a schoolhouse addition, *Petrie v. Common School Dist.,* 44 Idaho 92, 255 P. 318 (1927); purchase of a street sprinkler, *Williams v. City of Emmett,* 51 Idaho 500, 6 P.2d 475 (1931). Expenditures held to be within the ordinary and necessary exception include: salaries of city officers and employees, *Butler v. Lewiston,* 11 Idaho 393, 83 P. 234 (1905); repair of city waterworks, *Hickey v. City of Nampa,* 22 Idaho 41, 124 P. 280 (1912); construction of a jail in a newly created county, *Jones v. Power Co.,* 27 Idaho 656, 150 P. 35 (1915); maintenance of streets, *Thomas v. Glindeman,* 33 Idaho 394, 195 P. 92 (1921); cost of employing school teachers, *Corum v. Common School Dist.,* 55 Idaho 725, 47 P.2d 889 (1935).

Comparison of these earlier cases reveals one clear distinction between those expenses held to be ordinary and necessary and those held not to be; *new* contruction or the purchase of *new* equipment or facilities as opposed to repair, partial replacement or reconditioning of existing facilities. Thus, the court could hold that the city of Grangeville was not authorized, except by compliance with the requirements of Art. 8, § 3, to purchase an existing water system from the estate of a

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[19] In the *Bunting* case, the court held that the purchase of a site for a county courthouse, and building a courthouse, "is clearly not among the ordinary and necessary expenses of the county . . . . It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of $4,000, they might purchase one at a cost of $10,000, and proceed to erect a courthouse at a cost of $20,000, all of which would be in direct violation of the constitution." *See, Dunbar v. Board of Commrs.,* 5 Idaho 407, 49 P. 409 (1897). The *Bunting* court looked less to the nature of the expense than to the amount.

deceased city resident in the *Woodward* case, *supra,*[20] but could hold that the city of Nampa was authorized (without voter approval) to repair and restore its present water system after it was badly damaged in an attempt to put out a downtown fire in the *Hickey* case, *supra.* Similarly, the city of Moscow's decision to *improve* its existing waterworks system and build a water storage tank, to provide a "more adequate water supply" was within the application of Art. 8, § 3 of the Constitution. *Durand v. Cline,* 63 Idaho 304, 119 P.2d 891 (1941). *See also, Miller v. City of Buhl,* 48 Idaho 668, 284 P. 843 (1930), (purchase of electric generating system, to be paid for from receipts from sale of power and light, held to be required to comply with Art. 8, § 3); *O'Bryant v. City of Idaho Falls,* 78 Idaho 313, 303 P.2d 672 (1956), (entering into agreement with natural gas distribution system to provide gas for city residents and vicinity held to be covered by requirements of Art. 8, § 3, Idaho Const.); *Straughan v. City of Coeur d'Alene,* 53 Idaho 494, 24 P.2d 421 (1932), (purchase by city of municipal lighting plant, and of waterworks system, held to be within application of Art. 8, § 3); *Reynolds Construction Co. v. County of Twin Falls,* 92 Idaho 61, 487 P.2d 14 (1968), (construction of courthouse annex covered by Art. 8, § 3).

While it is true that recent cases dealing with application of Idaho Const. Art. 8, § 3, have interpreted the "ordinary and necessary" language more broadly,[21] they are not inconsistent with earlier case authority. In *Hanson v. City of Idaho Falls,* 92 Idaho 512, 446 P.2d 634 (1968), the court held that establishment of a "policeman's retirement fund" was within the ordinary and necessary proviso, reasoning that it was merely an extension of the city's salary compensation and support of its municipal law enforcement staff. Early cases were clear in ruling that salaries of municipal employees and related expenses are ordinary and necessary. *See, Corum v. Common School Dist., supra; Butler v. Lewiston, supra.*

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[20] "It will thus be seen that the ordinary and necessary expenses of said municipality may be contracted for by said city without any vote of the people, but where an expense is proposed to be incurred which exceeds the income and revenue provided for any year, such as the construction or purchase of a water system, or a part of such system, the same cannot be done without the assent of two-thirds of the qualified electors of said city." 13 Idaho at 660, 92 P. at 842.

[21] *See,* Moore, *Constitutional Debt Limitation, supra.*

In *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970), the court held that while repair and renovation of a municipal airport were not "inherently 'ordinary and necessary expenses' " the particular facts of that case brought them within the constitutional category. In its opinion the court stressed the upkeep and maintenance aspect of the city's expenditure. The court notes that the passenger terminal was an "unsound structure." Thus, while construction of a "wholly new terminal building" (see dissent of McFadden, J., *id.* at 779, 473 P.2d at 649) might be viewed as an expenditure not traditionally considered ordinary and necessary, the court's emphasis on the obsolescence and unsafe condition of the twenty-year-old facility places it within the "repair or maintenance" line of case authority. The court may have considered the expenditure in light of the city's obligation to maintain a safe, sound structure and the concomitant potential legal liability for failure to do so, which liability might itself create an ordinary and necessary expense. *See, Butler v. City of Lewiston, supra.*

The question is whether the cities' belief that there would be inadequate power supplies several years in the future is sufficiently analogous to the cases which hold that repair or reconditioning of existing facilities is an ordinary and necessary expense. It is argued that the expenditure was certainly necessary in light of BPA's notice of insufficient power supplies by 1983. Although hindsight tells us the cities were mistaken (there has turned out to be more than adequate electrical power from the same facilities existing in the early to mid 1970's), there is no way the cities could have known otherwise from existing information. However, we need not decide whether the expenditure was "necessary" within the meaning of Art. 8, § 3, for we hold that it was not "ordinary." "Ordinary" means "regular; usual; normal; common; often recurring . . . not characterized by peculiar or unusual circumstances." *Peterson, supra,* 93 Idaho at 778, 473 P.2d at 648. It would be difficult to apply these adjectives to the WPPSS agreement. It was a colossal undertaking, fraught with financial risk. It was open-ended; the cities could not have known what their ultimate debt or liability would be. One cannot stretch the meaning of "ordinary" to include an expense for which there could not be, until years later, certainty of limits. The funding agreement left the Idaho cities with extensive indebtedness—yet no ownership,

and minimal control, and only the possibility of electricity. Further, the agreement was for the construction of nuclear power plants, at an expense unencountered in the history of these cities' power ventures. One could conceive of a number of words to describe this undertaking, but "ordinary" would not be one of them.

We turn now to the second requirement of the constitutional provision: that the expenditure be authorized by the general laws of the state. While an Idaho municipality is authorized to "acquire, own, maintain and operate electric power plants, purchase electric power, and provide for distribution to the residents of the city", I.C. § 50-325, and may purchase for resale to BPA "electric power and energy" under a net-billing agreement, I.C. § 50-342, we can find no statutory authorization for the purchase of "project capability" where such purchase comprehends the payment of long-term indebtedness for which no power may be supplied, and for which no ownership interest is acquired. The municipality is neither acquiring, owning, maintaining, or operating a plant, nor purchasing electrical power. It is underwriting another entity's indebtedness in return for merely the possibility of electricity. Thus, we hold that the agreement entered into by the Idaho cities and WPPSS does not come with the ordinary and necessary proviso of Art. 8, § 3 of the Idaho Constitution, and that section consequently having application in this case, the agreement is void as to the cities, who were acting *ultra vires* by obligating their residents without an election and compliance with the constitution.

We note that we have had at issue before us only the agreement relating to Projects 4 and 5. The cities' authorization to enter into Project 1, 2 and 3 agreements is not at issue, and as we have pointed out, the two sets of agreements are sufficiently different to make much of our holding not applicable even by analogy to the earlier agreements, which we perceive to be in the nature of power purchase contracts more than long-term debt obligations. Since we hold that the cities' agreements as to Projects 4 and 5 are void, it follows that the alternative writ of prohibition in these consolidated cases is hereby made permanent.

DONALDSON, C.J., SHEPARD and BISTLINE, JJ., concur.

BAKES, J., dissenting:

I cannot join in the majority opinion. If viewed at the time of inception, instead of with hindsight, the contracts under analysis here should withstand any constitutional attack the petitioners could muster. It is only because, through hindsight, the majority can see what a "bad deal" the cities have made that they now attempt to extricate these cities from their precarious position through a unique interpretation of our constitution as applied to the facts of this case. Clearly, the contracts under consideration comply with any constitutional requirement. Analysis under Art. 8, § 3, reveals that (1) the obligation under the agreements is not the type of obligations contemplated under Art. 8, § 3; and (2) that even if the above reason fails, the agreements should still be upheld under the "ordinary and necessary" exception to the requirement of a citizens' election. Analysis under Art. 8, § 4, and Art. 12, § 4, leads to the same conclusion. Those sections do not invalidate these agreements because (1) the agency with whom the cities contracted is a public agency, and those sections merely prohibit contracts with private entities; and (2) there can be no lending of the credit of a public entity if the general fund of that entity is not liable on the obligation. Because these agreements withstand scrutiny under all of these constitutional provisions, the agreements should be upheld.

This is not to say that the cities are liable on these contracts. Our only concern in this case is the constitutionality of the cities' actions in entering into these contracts. This opinion would not preclude the cities from asserting any defenses to formation of these contracts that they might bring in another forum. In fact, it appears from the record that these cities have been discharged by a Washington trial court because of the action of the Washington Supreme Court in invalidating the contracts as to the Washington defendants. We should not bend our own Constitution in an effort to release from liability public entities who have improvidently, but constitutionally, entered into contracts from which they may also be relieved because of contractual defenses.

I

A

The obligation "incurred" by the cities under these agreements is not the type of "indebtedness or liability" contemplated by Art. 8, § 3. That section contemplates the type of liability or indebtedness that will be repaid by the collection of an annual tax. Thus, the section provides some protection for the taxpayers who will be required to pay such annual tax. It requires cities to go to those taxpayers and obtain their assent to the liability or indebtedness incurred by submitting the matter to an election. However, under these agreements, no tax will ever by required. The liability in question is not payable from the general funds of the city. By the terms of the contract itself, it is payable only from revenues obtained from the sale by the cities of electric power. The sole source of revenue from which the cities are obligated to make payment to WPPSS is the electric utility rates charged only to customers of the electric utilities operated by the cities, most but not all of whom are located within the cities. No tax funds are ever involved under this contract. Because this obligation can never be a liability on the general city fund, it is not the type of liability contemplated under Art. 8, § 3; thus, Art. 8, § 3, should not render the agreement void.

B

Another reason exists that should validate the Participants' Agreements under Art. 8, § 3. That section provides for an exception to the requirement of a citizens' election where the liabilities are "ordinary and necessary expenses authorized by the general laws of the state." The agreements were contracts for the acquisition of electricity. These participant cities were lawfully in the business of providing electricity to their residents and surrounding areas, and faced with a future shortage of electricity, the entering into of these agreements to provide a future source of electricity was an "ordinary and necessary" function of a city's business of providing such electrical power.

This Court has recognized that the "ordinary and necessary" exception shall be applied on a case by case basis. The

cases considered by this Court have defined "ordinary and necessary" in various ways.

> " 'Ordinary' means 'regular; usual; normal; common; often recurring . . . .' . . . 'Necessary' means "indispensable." . . . An expenditure, although not of a frequently recurring nature, may nonetheless be 'ordinary and necessary' " *City of Pocatello v. Peterson,* 93 Idaho 774, 778, 473 P.2d 644, 648 (1970).

This Court later defined "ordinary and necessary" as follows:

> "An expense is ordinary if *in the ordinary course of the transaction of municipal business,* or the maintenance of municipal property, *it may be and is likely to become necessary."* (Emphasis added.) *Thomas v. Glindeman,* 33 Idaho 394, 195 P. 92 (1921).

In *City of Pocatello v. Peterson,* 93 Idaho 774, 473 P.2d 644 (1970), we considered the question of whether a contract for the expansion of an airport facility was a contract for "ordinary and necessary" expenses within the exception to Art. 8, § 3. This Court considered several factors in the peculiar factual circumstances and concluded that the city's lease of the airport facility was ordinary and necessary. Several of the factors considered were: (1) the fact that the city was authorized by law to operate an airport; (2) that the city had in fact been operating an airport for a considerable period of time; and (3) that the existing facilities were inadequate and would in the future become obsolete and unsafe. The Court then concluded that for all of these reasons the repair and improvement of Pocatello's airport facility constituted an ordinary and necessary expense, thus falling within the exception to Art. 8, § 3. In its conclusion, the Court noted the following:

> "Furthermore the repair and improvement of the Pocatello airport facility is essential for the proper growth and development of the area. This is especially so since the railroads, upon which public travel and communications were heavily dependent in yesteryear, are discontinuing passenger service to many cities." 93 Idaho at 779, 473 P.2d 644.

The factors noted in *City of Pocatello* in finding those expenses to be ordinary and necessary are also applicable in the contextual framework involved here. The cities here are authorized by law to operate electrical power plants and

purchase electrical power for distribution to residents of the city. *See* I.C. §§ 50-325 and -342. All of these cities are in the business of distributing electrical power to their residents. Their residents are thus dependent upon these cities for their supply of electrical power. The source of power previously used by the cities was in effect becoming "obsolete," in that the BPA, from whom the cities had previously purchased their electrical power, had notified them that it would no longer be able to meet their electrical power needs by the early 1980's. The cities therefore were required to seek alternative sources of electrical power in order to continue service to their residents. All of these factors considered together indicate that this case is substantially similar to the question considered in *City of Pocatello v. Peterson, supra.* The liability incurred by the city was thus an ordinary and necessary expense, and the agreements do not violate Art. 8, § 3, of the Idaho Constitution and should not be struck down.

II

A

The majority opinion does not discuss Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, but the agreements also withstand scrutiny under those sections. Those provisions read:

> "**[Art. 8] § 4. County, etc., not to loan or give its credit**—*No* county, *city,* town, township, board of education, or school district, or other subdivision, *shall lend, or pledge the credit or faith thereof directly or indirectly, in any manner, to, or in aid of any individual association or corporation, for any amount or for any purpose whatever,* or become responsible for any debt, contract or liability of any individual, association or corporation in or out of this state." (Emphasis added.)
>
> "**[Art. 12] § 4. Municipal corporations not to loan credit**—*No* county, town, *city* or other municipal corporation, by vote of its citizens or otherwise, *shall ever* become a stockholder in any joint stock company, corporation or association whatever, or *raise money for or make donation or loan its credit to, or in aid of, any such company*

> *or association:* provided, that cities and towns may contract indebtedness for school, water, sanitary and illuminating purposes: provided, that any city or town contracting such indebtedness shall own its just proportion of the property thus created and receive from any income arising therefrom its proportion to the whole amount so invested." (Emphasis added.)

Art. 8, § 4, and Art. 12, § 4, of the Idaho Constitution, are both sections intended to limit the power of municipal corporations to lend or pledge their credit to outside entities. Art. 12, § 4, prohibits the lending of credit, but makes a specific exception for indebtedness for "school, water, sanitary and *illuminating purposes.*" Art. 8, § 4, "goes further and is more restrictive" than Art. 12, § 4, *Village of Movie Springs* v. *Aurora Mfg. Co.,* 82 Idaho 337, 353 P.2d 767 (1960). It absolutely prohibits the lending or pledging of credit directly or indirectly for any purpose whatever.

These two constitutional provisions have been interpreted in numerous Idaho cases. This Court has interpreted these provisions as prohibitions upon the lending of credit in aid of "private" associations or corporations. *See Board of County Comm'rs v. Idaho Health Facilities Authority,* 96 Idaho 498, 531 P.2d 588 (1975); *Village of Moyie Springs v. Aurora Mfg. Co., supra; School Dist. No. 8 v. Twin Falls County Mutual Fire Ins. Co.,* 30 Idaho 400, 164 P. 1174 (1917). As we stated in *Boise Redevelopment Agency v. Yick Kong,* 94 Idaho 876, 499 P.2d 575 (1972):

> "The purpose of such a prohibition is clear. Favored status should not be given any private enterprise or individual in the application of public funds. The proceedings and debates of the Idaho Constitutional Convention indicate a consistent theme running through the consideration of the constitutional sections in question. It was feared that private interests would gain advantages at the expense of the taxpayers. This fear appeared to relate particularly to railroads and a few other large businesses who had succeeded in gaining the ability to impose taxes, at least indirectly, upon municipal residents in western states at the time of the drafting of our constitution. We are led to the firm conviction that only private interests were intended to

> fall within the strictures of those sections relating to 'association,' 'corporation' and 'joint stock company.' " *id.* at 883-84.

In *Yick Kong* we were considering the constitutionality of the creation of a redevelopment agency intended to rehabilitate the downtown area of the City of Boise. We held that the redevelopment agency, being a public and not a private enterprise, did not fall within the strictures of Art. 8, § 4, and Art. 12, § 4. We recently reaffirmed *Yick Kong* in *Idaho Falls Consolidated Hospitals v. Bingham County Board,* 102 Idaho 838, 642 P.2d 553 (1982). There we said:

> "A review of the proceedings at the constitutional convention, the history of the west, and a similar statute that was in effect at the time the constitution was adopted, show that the delegates only sought to prevent private interests from gaining advantage at the expense of the taxpayer." 102 Idaho at 842, 642 P.2d 553.

In the present case WPPSS is not a private entity. Rather, it is a public corporation established by nineteen public utility districts in the State of Washington and the cities of Seattle, Tacoma, Richland and Ellensburg, and incorporated under the laws of the State of Washington. Thus, the evil sought to be avoided in Art. 8, § 4, and Art. 12, § 4, the lending of public credit to private enterprise, is not present here. Significantly, even if an incidental benefit to a profit-making enterprise is present, that in itself will not invalidate a program that has a public purpose. "Only if private interests are primarily benefited, must such programs with public goals be invalidated." *Board of County Comm'rs v. Idaho Health Facilities Authority, supra.* Here, although the argument may be made that certain private entities are benefited by the participation of the cities in the WPPSS agreement, the primary benefit of the agreements inures to the public users of electrical power. Thus, in the present case, and under these facts, there is no violation of Art. 8, § 4, or Art. 12, § 4.

A final reason for upholding these contracts lies in the arguments already presented. Art. 8, § 4, and Art. 12, § 4, both require a lending or pledging of the credit of the municipality. There can be no lending or pledging of that credit if the general fund itself is not liable on the obligation. As shown before, this

obligation is payable only out of revenue from the utilities operated by the cities; thus, no general fund is liable. This is not the type of situation envisioned in these two articles of our Constitution.

Thus, under any analysis of these agreements and our Constitution, they should withstand scrutiny and should be enforced.

APPENDIX J

Section 10, clause 1, of Article I of the United States Constitution provides:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX K

Affiliates and Subsidiaries (Except Wholly-Owned Subsidiaries) of Chemical Bank

MCL and Co., Ltd.
Arrendadora Del Atlantico S.A.
Compania Arrendamento De Financiera, Arfin S.A.
Far East Chemco Leasing & Financing Corp.
P.T. Chemco Graha Sejahtera Leasing
Noroeste Chemical, S.A.
C.B. Insurance Services Ltd.
Chemical Bank Hong Kong Nominees, Ltd.
Apartmentos Boulvard, S.A.
Banco General De Negocias, S.A.
Banco Noroeste De Investimento
Banque Internationale Du Congo
Empresa Minera De Mantos Blancos, SA
Far East Bank and Trust Co.
Industrialization Fund of Finland, Ltd.
Inversiones Sudamerica, SA
Leyland Italia Finanziaria, SpA
Nalin Ind. Sendirian Berhad
Northwest Iron Co. Ltd., Delaware, U.S.A.
Private Export Funding Corp., U.S.A.
Private Investment Co. for Asia
Phoenix Travel (Strand) Limited
P.T. Multinational Finance Corp.
Saehan Merchant Banking Corp.
Sanluis Financial and Investment Co., Ltd.
Sifida
Sociedad Anonima Escuela Campo Alegre
Sociedad Financiera Exterior, CA
ChemCredit Sendirian Berhad
Florida National Banks of Florida, Inc.
Gulf Stream Aero Space
S.W.I.F.T.
Albuquerque Capital Management, Inc.

Alexander, Scriver and Associates, Inc.
BaCh Holding Corporation
Brown & Company Securities Corporation
Chemgraphics Systems, Inc.
Chemical Business Credit Corp.
Chemical Equity Incorporated
Chemical Venture Capital Corporation
Chemical First State Corporation
Chemical Bank (Delaware)
ChemExec ReloSystems, Inc.
Chemical Connecticut Corporation
Chemical Denver, Inc.
Chemical Philadelphia Corp.
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical New York Corporation
Chemical Trust Company of Florida, N.A.
Chemical Investment Advisers, Inc.
Chemical Mortgage Company
Blendon Woods Corp.
Chemical Appraisal Associates, Inc.
Chemical Realty Capital, Inc.
Javelin Properties, Inc.
Chemical New Jersey Corporation
Chemical New York Corporation—USA
Chemical New York, Inc.
Chemical New York N.V.
Chemical New York Southwest, Inc.
Chemical Real Holdings, Inc.
Chemical Realty Corporation
Dommerich Factors, Inc.
Favia, Hill & Associates, Inc.
Investment and Capital Management Corp.
Investment and Capital Management of the South, Inc.
Pronto, Inc.
Pronto Link Corporation
Pronto U.S.A., Inc.
B/L U.S.A., Inc.
Electronic Customer Services, Inc.

Sunamerica Corporation
Chemical Financial Services Corporation
Chemical Financial Services Corporation of Colorado
SFC Agency Inc.
Sunamerica Corporation
Sun Financial Corporation
Sun America Finance, K.K. (Japan)
Sunamerica Financial Corporation
Sunamerica Financial Services, Inc.
Fort Collins Sunamerica Industrial Bank
Greeley Sunamerica Industrial Bank
Denver Sunamerica Industrial Bank
Springs Sunamerica Industrial Bank
Park Sunamerica Industrial Bank
The Portfolio Group, Inc.
Van Deventer and Hoch, Inc.
Chemical Bank International—North America
Chemco International Inc.
Chemical International Finance, Ltd.
Chemco International Leasing Inc.
ChemLease Worldwide, Inc.
Chem Network Processing Services, Inc.
Chem Credit, Inc.
Chemical Bank of Canada
Chemco Canada Leasing, Inc.
Chemical Bank Trustee Co. Ltd.
Chemical Bank (Middle East) SAL
Bank of New Providence, Ltd.
Chemical Bank/Howard de Walden
Chemical Sanwa Merchant Bank, Ltd.
ChemBank Nominees Limited
Chemical Bank Insurance Services, Ltd.
Chemical Asia Limited
Chemical Bank Nominees, Ltd. (Hong Kong)
Chemical Bank (Guernsey) Ltd.
Chemical Bank Pension Plan Trustee Ltd.
Chemical Bank International Ltd.
Chem Bank International Nominees, Ltd.
Chem Bank International Leasing, Ltd.
Chemsecurities, Ltd.

Chem Bank International (Underwriters) Ltd.
Chem Bank International Investment Holding Co.
Chemical Bank (France) S.A.
Chemical Bank Trustee Co., Ltd.
Chemical International Finance and Consulting S.A./N.V.
Chemical Holdings, Ltd.
Chemical All States Ltd.
CB Beteilgungs Und Verwaltungsgesellschaft m.b.h.
Chemical Bank Computer Services g.m.b.h.
Chemical Bank A.G.
Chemco Leasing g.m.b.h.
Unterstuetzungsgesellschaft m.b.h. der Chemical Bank
Chemical Bank (Suisse) S.A.
Chemtime, Ltd.
Chemco Cayman Ltd.
Chemco Finance (Hong Kong) Limited
Chemco Leasing Japan Inc.
Shin Aoyama Enterprise
Chemco Finance Singapore Limited
Chemco International Limited
Witan Enterprises, Inc.
Woodmere Enterprises, Inc.
Chemco Leasing S.A.
Chemco Leasing B.V.
Chemco Leasing Belgium S.A./N.V.
Chemco Leasing Iberico, S.A.
Chemco Leasing (Thailand) Ltd.
Chemco Leasing und Finanz A.G.
Chemco Location S.A.
Chemco Commercio E Servicos Ltda.
Libmar One Inc.
Libmar Two Inc.
Libmar Three Inc.
Libmar Four Inc.
Libmar Six Inc.
Marlib Alpha Inc.
Marber One Ltd.
Marber Two Ltd.
Marpan One, Inc.
Marpan Two, Inc.

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FEB 13 1985

No. 84-1258 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF SALOMON BROTHERS INC; SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED; PRUDENTIAL-BACHE SECURITIES INC.; AND MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, Salomon Brothers Inc; Smith Barney, Harris Upham & Co. Incorporated; Prudential-Bache Securities Inc.; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated respectfully move for leave to file a brief *amicus curiae* in the above-captioned proceedings, and in support thereof state:

1. While the petitioners and one of the respondents have consented to filing of the attached brief *amicus curiae*, *amici* have been unable to obtain the consent of the remaining respondents.

2. The decision of the Washington State Supreme Court upholding the respondents' taking of bondholders' property

without payment of just compensation raises questions of far-reaching importance to the national municipal bond market.

3. As explained more fully in the attached brief, the decision below will substantially and adversely affect the *amici* as purchasers and underwriters of billions of dollars in municipal bonds. For that reason, *amici* have a vital and continuing interest in the outcome of this litigation that can only be protected by prompt review by this Court.

4. Accordingly, *amici* seek this opportunity to make their views known to the Court and assist the Court in its decision on the Petition for a Writ of Certiorari.

Counsel for *amici* hereby request that the Court grant this Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

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QUESTION ADDRESSED

Is the decision of the Supreme Court of the State of Washington in conflict with this Court's decisions interpreting the Taking Clause, particularly *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980)?

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INTEREST OF THE *AMICI*

This litigation involves the largest governmental confiscation of private property in American history. Private parties residing throughout the United States made loans to agencies of the State of Washington, and those agencies subsequently repudiated their own unequivocal commitments to repay principal and interest. This repudiation—combined with the Washington State Supreme Court's ruling that no compensation was due or owing to the private parties—effected an uncompensated taking of private property of unprecedented dimensions.

The Washington Public Power Supply System ("WPPSS") issued to private parties $2.25 billion in bonds under the supervision, and for the benefit, of 88 municipalities, public utility districts, and electric cooperatives located in six states (the "Participants"). The Participants initiated and approved WPPSS' issuance of the bonds in order to provide financing for construction of two nuclear power plants that were designed to provide electric power for the Participants' customers.

To induce prospective bondholders to lend their money, the Participants unconditionally guaranteed repayment of principal and interest whether or not the nuclear plants were ever completed and repeatedly represented to the bondholders that the Participants had the authority to make these guarantees. After the Participants had caused the bondholders' funds to be spent for construction of the plants, construction was terminated before completion. Many of the Participants then abruptly repudiated their unconditional guarantees, refusing to return any portion of the money borrowed or to pay the agreed-upon interest.

In a decision that sent shock waves throughout the investment community, *see, e.g., Up From Whoops*, Wall St. J., Aug. 13, 1984, at 16, col. 1 (editorial characterizing the decision as "strange" and "corrupting"), the Washington State

Supreme Court held that most of the Washington Participants, although acting on behalf of the state, had lacked statutory authority to enter into the unconditional guarantees. Pursuant to that ruling, a subsequent decision of the Washington trial court absolved *all* of the Participants, including those from other states, of any obligation to repay. The Participants' repudiation, as countenanced by these rulings, caused WPPSS to default on the bonds. In a subsequent decision, the Washington Supreme Court affirmed the rulings below and rejected each and every legal and equitable state law and constitutional claim for relief pressed by the bondholders, including a claim under the Taking Clause, thus imposing on unsuspecting bondholders throughout the United States the full cost of the Participants' public projects.

Amici (the "Underwriters") are four of the nation's leading investment banking firms, annually leading syndicates underwriting over $10 billion in municipal securities. The Underwriters led syndicates consisting of hundreds of other underwriting firms that purchased the bonds at issue in this case and then resold them to customers. In purchasing and selling the bonds, the Underwriters acted throughout in reliance upon the Participants' unconditional guarantees.

The bondholders, justifiably aggrieved by the Participants' repudiation, have sought recompense by commencing securities fraud actions in federal court against virtually all parties involved in the financing and construction of the nuclear plants, naming numerous defendants, including the Underwriters, and seeking billions of dollars in damages. These actions are virtually unmatched in scope, involving over one hundred parties and as many law firms, with millions of dollars in legal fees already incurred and continuing to mount.[1]

---

1 These actions do not provide a clear path to any meaningful recovery for the bondholders, since each cause of action asserted imposes the difficult requirement that the plaintiffs make a showing of wrongdoing *ab initio* (*i.e.*, a showing that false representations were the result of scienter or culpable negligence).

The Underwriters believe that the decisions of the Washington Supreme Court are not only in conflict with this Court's prior decisions interpreting the Taking Clause, U.S. Const. amend. V, but that this case presents issues of vital and continuing importance concerning the appropriation of private property for public use without compensation. So long as the decisions of the Washington Supreme Court stand as precedent, they will continue to undermine the stability of the municipal bond market, increase the cost of municipal financing, and discourage investors from extending loans to municipal borrowers for fear that their property will be similarly confiscated.

STATEMENT

The Participants wished to build the two nuclear plants without having to advance their own money (*i.e.*, their ratepayers' funds) until the plants could be completed. They engaged WPPSS, a joint operating agency and municipal corporation created by Washington law, to build the two plants and to finance construction through the sale from 1977 to 1981 of fourteen offerings of bonds.

The Participants contracted with WPPSS to purchase percentage shares of the power to be generated by the plants, agreeing to pay to WPPSS a prorated share of the costs of constructing the plants, including amounts required to pay the principal and interest due on the bonds. To persuade investors to finance this public venture, the Participants contractually committed that the bonds would be repaid out of the Participants' revenues whether or not the plants were ever completed and ever generated electricity. (The Participants further covenanted to raise their rates—which they represented to be unregulated—to whatever extent necessary to generate sufficient revenues to satisfy their commitment to fund payment of the bonds.) These so-called unconditional "dry hole" commitments of the Participants were in common and unquestioned usage in the power industry at that time. These commitments also constituted the only security for the bonds.

Throughout the four-year period during which the bonds for these two plants were marketed, the Participants repeatedly affirmed to prospective bondholders their intention to repay the loans and fulfill their "dry hole" commitments. Counsel for each Participant furnished to WPPSS an opinion letter stating, *inter alia*, that the Participant's obligations, including the "dry hole" commitment, constituted valid and binding obligations of the Participant. The fourteen Official Statements subsequently issued by WPPSS in connection with the bond offerings—approved by representatives of the Participants and intended for bondholder examination—each described the Participants' unconditional "dry hole" commitment and annexed opinion letters from WPPSS' special counsel and bond counsel stating that this commitment imposed valid and enforceable obligations. Investors in municipal bonds look to such expert opinions as critical confirmation of the security of a prospective investment, and they will not purchase bonds in the absence of a favorable opinion of bond counsel. The bondholders relied on all of these repeated and explicit assurances that the Participants had the authority and intent to repay.

The representations of Washington State did not stop with the Participants or WPPSS itself. The State Auditor also directly confirmed for bondholders that the Participants' contractual commitments were valid and binding. From 1976 through 1980, the State Auditor each year examined the operations of WPPSS and certified its "financial condition and resources" and compliance with the laws of the State. (With respect to the construction of the two nuclear plants, the only meaningful "financial resources" WPPSS could claim were, of course, the Participants' obligations to make payments.)[2]

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2 The State Auditor subsequently reported to the Washington State legislature that among the reasons for treating the Participants' contractual agreements as liabilities of the utilities was the fact that the Participants were "unconditionally obligated for repayment of [the WPPSS debt] whether or not the projects are completed, operable or operating . . . ." Memorandum No. 81-17, Senate Energy and Utilities Committee Files, at 1-2.

Moreover, examination of the only published adjudicatory decisions concerning the validity of the Participants' contractual commitments issued prior to the Participants' repudiation of their obligations would also have led inevitably to the conclusion that the commitments were valid. In licensing proceedings commenced by WPPSS for the benefit of the Participants, the Nuclear Regulatory Commission—at the instance of WPPSS—determined that WPPSS had adequate financing to insure safe construction of its plants and therefore issued construction permits for the two plants. This determination was expressly premised upon findings of fact and conclusions of law that the Participants were obligated to satisfy their contractual commitments. *In re Washington Public Power Supply System*, 7 N.R.C. 599, 630, 639 (1978); *In re Washington Public Power Supply System*, 7 N.R.C. 254, 257-58, 269 (1978).

Prior to the time that the plants were faced with large cost overruns and a moratorium on construction, there was no hint of any question raised by any person concerning the validity of the "dry hole" commitments. As the Washington Supreme Court noted, "all parties assumed that statutory authority existed." *Chemical Bank* v. *Washington Public Power Supply System*, 102 Wash. 2d 874, 899 (1984). Then, after the WPPSS Board of Directors, with the consent of the Participants, terminated the projects on January 22, 1982, certain of the Participants abruptly reversed their prior position and proceeded to repudiate their "dry hole" commitments, refusing even to return the principal amount of the bonds.

As is fully detailed in the petition filed by petitioner Chemical Bank, the Washington Supreme Court subsequently held, in two surprising decisions, not only that the Participants' contractual commitments were void and unenforceable, but also that no relief whatsoever was available to the bondholders under state law or equity (or under the Constitution of the United States)—in short, the Participants were wholly excused from any obligation to pay either principal or interest on the loans. *See* Chemical Pet. at 9-13; *Chemical Bank* v. *Washington Public Power Supply System*, 102 Wash. 2d 874 (1984)

(*Chemical Bank II*); *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) (*Chemical Bank I*).

The Underwriters do not here seek to challenge the state court's interpretation of Washington law—no matter how questionable its rulings on that subject appear to have been.[3] Rather, the Underwriters assert that when the upshot of the Washington Supreme Court's ratification of the Participants' repudiation is to deny the bondholders *any* avenue of recourse under *any* theory of state law, that result brings about a taking of the bondholders' private property without just compensation in violation of controlling federal constitutional law.[4]

SUMMARY OF ARGUMENT

This case falls squarely within the analytical framework this Court has employed in its recent Taking Clause decisions: the character of the governmental action involved here, its economic impact, and its interference with the bondholders' reasonable investment-backed expectations all point to a violation of the Taking Clause. Moreover, the decision of the Washington Supreme Court is in direct conflict with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980).

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3 As the Chemical Bank petition demonstrates, the Washington court's handling of each of the bondholders' claims was marked by hypertechnical and tortured reasoning in which every issue was resolved in favor of the Participants. *See* Chemical Pet. at 23-27.

4 Because the Underwriters view this case as readily resolvable on Taking Clause grounds, the Underwriters do not believe it necessary to reach any issues under the Contract Clause, although it is noteworthy that this Court has consistently protected private parties from attempts by states to repudiate the obligations of their own securities. *E.g.*, *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977) (bonds); *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935) (bonds).

ARGUMENT

The elements of the taking at issue in this case are uncomplicated. *First*, one group of entities of the State of Washington (Washington municipal and PUD Participants), together with WPPSS (itself a municipal corporation of the State of Washington)—undeniably acting under color of state law—were responsible for borrowing $2.25 billion from private bondholders, promising to repay both principal and interest. *Second*, the Participants failed to return any portion of the funds, totally repudiating their repayment obligations. *Third*, another entity of the State of Washington (the Washington Supreme Court) sanctioned this total repudiation, denied the availability of any and all judicial remedies, and definitively decreed that no compensation would be forthcoming. The deliberate inducement by state instrumentalities of this transfer of private funds, the repudiation by those state entities of the obligation to repay, and the judicial sanctioning of this repudiation constitute a clear and massive uncompensated taking of property by the State of Washington in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

A. The actions of state agencies and the decisions of the Washington Supreme Court give rise to an unconstitutional taking under this Court's recent decisions.

While analysis of any Taking Clause claim requires an "essentially ad hoc, factual" inquiry, *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978), the Court has identified three factors that are to be examined in determining whether an unconstitutional taking has occurred. These factors are "[1] the character of the governmental action, [2] its economic impact, and [3] its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980). *See, e.g., Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979).

In this case, "the character of the governmental action" is blatantly confiscatory. This is not a case in which property is being taken in order to advance some social policy of the state. *Cf. Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) (landmark preservation). Moreover, here no single "stick" from "the bundle of rights that are commonly characterized as property" is being taken. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979). Rather, by denying the bondholders not only the agreed-upon interest for the use of their funds but also any right to simple restitution of the principal amount they had loaned, the state has confiscated each and every "stick" from the "bundle"—an action that clearly amounts to an unconstitutional "taking." *See Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979).

Likewise, the "economic impact" of the state's action is draconian. The "dry hole" commitment was the sole security for the bonds, and it has been totally destroyed. State agencies received loans of $2.25 billion, and the state has decreed that they need return nothing. The "economic impact" on the bondholders' assets is thus every bit as devastating and complete as would be a "physical invasion [of tangible property] by government." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *see, e.g., United States* v. *Causby*, 328 U.S. 256 (1946).

In assessing Taking Clause claims, recent decisions of this Court have attached particular significance to the third factor—governmental interference with "the reasonable investment-backed expectations" of private parties. *See Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). In this regard, the Court has repeatedly found that government representations that preexisting property will not be damaged or interfered with by governmental actions create protectible investment-backed expectations which the government may not destroy without paying just compensation. *See Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2877-78 (1984) (federal agency's representation that trade secret information provided to the government would be kept confidential

"formed the basis of a reasonable investment-backed expectation" that must be compensated if frustrated); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979) (representations of government officials to private owners of a pond that they would continue to have exclusive use of the pond after dredging a channel linking it to a navigable waterway "can lead to the fruition of a number of expectancies embodied in the concept of 'property' "). *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20 n.17, 27 n.26 (1977) (express promises made by government give rise to protectible expectations, with compensation due if such expectations are then destroyed).

Here, the State endeavored mightily to create the bondholders' unquestionably reasonable investment-backed expectations that they would be repaid their principal, together with interest. In order to induce bondholder loans, the Participants and WPPSS (agencies of the state) repeatedly and continuously promised and advertised to prospective bondholders and the investing public the Participants' "dry hole" commitments. Expert bond counsel employed by WPPSS rendered a frequently published opinion that the Participants' obligations were valid and enforceable. The State Auditor publicly certified the financial condition of WPPSS, which was critically dependent on the validity of the "dry hole" financing mechanism. Moreover, in order to obtain the licenses required to construct nuclear plants, WPPSS, on the Participants' behalf, convinced the Nuclear Regulatory Commission, a federal agency acting in an adjudicatory proceeding, to adopt and publicly issue findings of fact and conclusions of law to the effect that the Participants were obligated to make the payments under their "dry hole" commitment.

It is also highly significant that the investors in this case purchased *bonds*. While other kinds of investments (*e.g.*, purchases of equity securities) may create "reasonable investment-backed expectations," the expectations associated with a bond are unique. With a bond, an investor gives up his property (in the form of money paid for the bond) temporarily (for the term of the bond) with the firm expectation, memorial-

ized in a written unambiguous instrument, that the investor will get back the property loaned (the principal) with interest. *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 27 n.26 (1977).

In these circumstances, the bondholders had every reason to believe that the transactions they had entered into were what the State repeatedly and unequivocally represented them to be—namely, normal, traditional and secure municipal bond transactions. As the Washington Supreme Court itself was compelled to find, "all parties assumed statutory authority existed." *Chemical Bank II*, 102 Wash. 2d at 899.

B. The decisions of the Washington Supreme Court directly conflict with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*.

The unadorned pronouncement of the Washington Supreme Court that "no taking occurred," *Chemical Bank II*, 102 Wash. 2d at 912, conflicts squarely with this Court's holding in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). *Webb's* stands for the principle that the Taking Clause prohibits a state from redefining traditional property interests by *ipse dixit* in order to evade the constitutional requirement of just compensation. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("[T]he government does not have unlimited power to redefine property rights.") (citing *Webb's*); *see also Hughes* v. *Washington*, 389 U.S. 290, 296-97 (1967) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.") (Stewart, J., concurring).

In *Webb's*, a pharmacy chain called Eckerd's had agreed to purchase Webb's, another chain. At the closing, Webb's debts appeared to exceed the agreed-upon purchase price. In order to be assured of becoming the owner of Webb's, Eckerd's availed itself of a state statutory procedure by which it could tender the purchase price to the court and file a complaint of inter-

pleader in state court, interpleading as defendants Webb's and its creditors. *See* 449 U.S. at 156-57.

The state court then ordered that the amount tendered as the purchase price be paid to the clerk of the court and that the clerk deposit the tendered fund in an assignable interest-bearing account, retaining for the state the interest earned on the fund during its deposit pursuant to a statute declaring that "interest accruing from moneys deposited shall be deemed income of the office of the clerk . . . ." The clerk also deducted from the tendered fund a statutorily determined service fee. The court subsequently appointed a receiver, to whom the clerk delivered the fund, less the interest earned and the statutory fee. *See id.* at 156-58 & n.1.

The receiver thereupon brought a proceeding to gain possession of the nearly $100,000 in interest earned on the fund, claiming that, notwithstanding the state statute, the interest should not be viewed as state property but should have followed the principal. The Florida Supreme Court ultimately upheld the state statute against constitutional challenge, ruling that the interest was public property, because, in the absence of the statute, the clerk would have lacked authority to invest the money, and "[t]here is no unconstitutional taking because interest earned on the clerk of the circuit court's registry account is not private property." *Beckwith* v. *Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951, 953 (Fla. 1979); *see* 449 U.S. at 158-59.

This Court reversed in a unanimous opinion delivered by Justice Blackmun. The opinion began by noting that there was no question that the principal sum deposited with the state court was private property, 449 U.S. at 160, and that the interest was clearly not owing to the state as a fee for the clerk's services, since a separate statutory fee was required and paid. *Id.* at 162. The Court then noted "[t]he usual and general rule . . . that any interest on an interpleaded and deposited fund follows the principal," *id.*, and flatly rejected the reasoning of the Florida Supreme Court that the interest would be treated as public property simply because a state statute declared it to be so, holding:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.
>
> —*Id.* at 164.

Webb's clearly shows that the actions of the Participants ratified by the Washington Supreme Court give rise to a "taking" in the present case. Both *Webb's* and the instant case involve voluntary commercial transactions in which private parties' money was tendered to state entities. In *Webb's*, the money was deposited in court in connection with a voluntary purchase of the debtor's assets. In *Chemical Bank II*, the bondholders' money was loaned to WPPSS in a voluntary exchange for bonds carrying a promise to repay principal and interest. In both cases, a taking was consummated when state entities refused to give back what they had temporarily been given *and* a state court not only upheld the refusal but declined to award any compensation. The taking, in short, was completed here when the Participants repudiated their obligation to repay and the Washington Supreme Court endorsed that repudiation by holding that the bondholders were entitled to return of neither principal nor interest on their loans.

Indeed, the conclusion that an unconstitutional taking occurred here follows *a fortiori* from *Webb's*. The clerk in *Webb's* "took" only the interest on a fund—one of many sticks in the "bundle of property rights"—while the Washington Supreme Court has permitted state entities to take the entire bundle, *i.e.*, principal and interest. The character of the governmental action in this case and its economic effect are thus dramatically more confiscatory than in *Webb's*.

The parties in *Webb's* were also on far shakier ground than the bondholders here in pressing the reasonableness of their investment-backed expectations. Prior to the deposit in court in *Webb's*, all parties were aware of the Florida statute explicitly "warning" that interest earned on the fund would be retained by the clerk and was not their property. *See* 449 U.S. at 157. The notion that the parties might have been able to

overturn Florida's statute on constitutional grounds would have been essentially speculative. By contrast, prior to the bondholders' loans, the Participants, WPPSS, their counsel, and the State Auditor gave the bondholders every reason to believe that the "dry hole" commitments were unassailable, and the surprising *post hoc* decision of the Washington Supreme Court to the contrary could not remotely have been foreseen by the bondholders.

The only shadow the Washington Supreme Court even attempted to cast over the reasonableness of the bondholders' expectations was its suggestion that the bondholders should have brought a declaratory judgment action at the outset to determine the validity of the Participants' "dry hole" commitment. *See Chemical Bank II*, 102 Wash. 2d at 906. The Washington court thus essentially ruled that the bondholders' failure to seek such a prior judicial declaration effectively converted the bondholders' legitimate investment expectancy into an unwarranted speculation requiring no legal protection. But the suggestion that—even in the absence of any dispute or question having been raised as to validity—every time a municipal security is offered for sale in this nation, a prospective bondholder must obtain a prior declaratory judgment certifying the municipality's authority to issue the security (or else run the risk of being found, to use the terminology of the Washington Supreme Court, guilty of "neglect") not only defies common sense, but would also undermine the prompt and efficient workings of the nation's municipal capital markets. Moreover, the Washington Supreme Court's logic would even more clearly have required a different result in *Webb's*, since there, too, none of the parties sought a declaratory judgment before the fund was deposited in court—notwithstanding the fact that in *Webb's* the existence of a "controversy" was manifest from the outset.[5] Furthermore, the Washington court's logic ignores the repeated—and unques-

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5 There is no question that Florida's declaratory judgment procedure would have been available to the parties. *See* Fla. Stat. Ann. §§ 86.011-.111 (West Supp. 1984).

tioned—chorus of state assurances to prospective bondholders vouching for the validity of the "dry hole" commitments and is thus totally inconsistent with this Court's repeated protection of "*reasonable* investment-backed expectations."[6]

This is not to say that the bondholders supposed their loans to be devoid of all risk. For example, they clearly and necessarily assumed the risk that market price fluctuations could depress the trading value of the bonds and the risk that the Participants might become insolvent and therefore incapable of making payments. However, in light of the repeated representations of the state agencies that the contractual commitments were valid, the one risk that the bondholders most assuredly did *not* assume was that a court would one day deem the Participants to have lacked authority to enter into these commitments. And, *a fortiori*, the bondholders cannot be deemed to have assumed the risk that the same court would determine that they were entitled to receive no compensation whatsoever—not even restitution of the principal amount they had lent to the State. In short, the Washington Supreme Court manifestly overstepped constitutional bounds when it held, in effect, that the bondholders assumed the risk of an unconstitutional state confiscation of their entire "bundle" of property rights: principal as well as interest.[7]

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6 It should also be noted that Chemical Bank, in its petition, demonstrates that, based upon the terms of the Washington statutes, the declaratory judgment procedure did not appear to be available to the bondholders until the Participants repudiated their obligations and created a justiciable controversy. *See* Chemical Pet. at 19 & n.11.

7 The bondholders are entitled under the Taking Clause not only to restoration of their principal, but also to payment of interest as compensation to them for the *temporary* taking of the beneficial use of their money. *See San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 653-58 (1981) (Brennan, J., joined by Stewart, Marshall and Powell, JJ., dissenting); *accord, id.* at 633-34 (Rehnquist, J., concurring); *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *United States* v. *Causby*, 328 U.S. 256, 258-59 (1946).

This case thus presents the basis for a critically important, yet straightforward, decision by this Court, reaffirming the Court's prior decisions restricting governments' ability to take private property without just compensation. The Court need only hold that, when state agencies obtain property from private parties by repeatedly assuring governmental repayment with interest, the state is not free later to declare that the investment-backed expectations it created did not constitute a "loan," but a "gamble," entitled to no legal protection whatsoever.

If the decisions of the Washington Supreme Court are permitted to stand, a gaping hole will have been cut into the Taking Clause as interpreted in *Webb's*—indeed, one large enough to swallow much of our fundamental institution of private property. When states are free to avoid the costs of just compensation and the rigors of eminent domain by the expedient of first having state agencies "borrow" private property, and then having state courts judicially "discover" that the state agencies lacked statutory authority to engage in the borrowing, the institution of private property is clearly under attack. If the Washington Supreme Court's decisions are not reviewed and ultimately reversed, municipal bond offerings will become "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 84-1258 (4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*
AND
BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE SECURITIES INDUSTRY ASSOCIATION AS *AMICI CURIAE*

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Bankers Association, The New York Clearing House Association and the Securities Industry Association respectfully move pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amici curiae* supporting the petition for a writ of certiorari. Although the petitioners and one of the respondents have consented to the filing of the brief, *amici* have been unable to obtain the consent of the remaining respondents.

The decision of the Supreme Court of the State of Washington nullifying certain of the respondents' pledges of credit to support bonds issued by petitioner Washington Public

Power Supply System raises questions of substantial importance to the Nation and its capital and credit markets. If allowed to stand, that decision will substantially and adversely affect the members of the three *amici,* who are significant principals, intermediaries, and advisors in the credit and capital markets of the United States. For that reason, and as more fully stated in the brief under the heading "Statement and Interest of *Amici Curiae,*" the members of the *amici* have a vital and continuing interest in the outcome of this action that can only be protected by review by this Court.

The three *amici* therefore pray that the Court grant this motion for leave to file their brief.

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WPPSS Default on $2.25 Billion in Bonds Is Record for Municipal Debt; Suits Seen, Wall Street Journal, July 26, 1983 5

IN THE

Supreme Court of the United States

October Term, 1984

No. 84-1258

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE AMERICAN BANKERS ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION AND THE SECURITIES INDUSTRY ASSOCIATION AS *AMICI CURIAE*

The American Bankers Association (the "ABA"), The New York Clearing House Association (the "Clearing House") and the Securities Industry Association (the "SIA") submit this brief as *amici curiae* in support of the petition and on an issue of vital importance to the rule of law and to the Nation's capital and credit markets: Whether the Constitution permits repudiation of pledges of credit by a State or its municipalities on which money has been borrowed and spent, leaving the creditors wholly without legal or equitable recourse.

Statement and Interest of *Amici Curiae*

The ABA is the largest national association of commercial banks, numbering among its members 13,000 banks (about 93% of domestic commercial banks) located in fifty States and the District of Columbia. The Clearing House is an association of twelve leading commercial banks in the City of New York. The SIA is an association of over 500 brokers and dealers responsible for over 90 percent of the country's investment banking and securities brokerage business. Each of the three *amici* regularly participates as a party or *amicus curiae* in cases raising important questions of law affecting its members' businesses.

The members of the three *amici* act as principals, intermediaries, and advisors in the credit and capital markets of the United States. The members of the ABA and the Clearing House extend tens of billions of dollars of loans to States and their instrumentalities and municipalities and hold hundreds of billions of dollars of the bonds and notes of such issuers in their own investment portfolios and trust accounts.[1] The members of the SIA bring to market as underwriters all types of debt instruments by which such issuers finance their cash flow and capital requirements and make markets as dealers in such securities after their issue. The members of all three *amici* act as advisors to millions of individual Americans, many of modest means, who have devoted a good portion of their lives' savings to such investments, depending on them for retirement income and as secure capital for unforeseen needs and for estate purposes.

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[1] Commercial banks hold about one-third of the outstanding state and municipal bonds. LEHMAN BROTHERS, PUBLIC POWER FINANCE: THE YEAR IN REVIEW AND CHALLENGES FOR THE FUTURE 7 (1984) (hereinafter "LEHMAN BROTHERS"). Commercial banks also underwrite general obligation bonds of public issuuers for distribution to the public.

As the Court knows, the banking and securities *amici* have appeared here in opposition to one another in cases where the Court has been called upon to determine the line of demarcation between their two businesses set by Congress. *See, e.g., Securities Industry Ass'n* v. *Board of Governors,* 104 S. Ct. 3003 (1984); *Securities Industry Ass'n* v. *Board of Governors,* 104 S. Ct. 2979 (1984); *Board of Governors* v. *Investment Company Institute,* 450 U.S. 46 (1981). On this occasion they are united in urging the Court to require the State of Washington to accept and adhere to the Court's unbroken and unequivocal line of decisions requiring the States and their subordinate entities to honor their commercial obligations.

Summary of Argument

The decision below is directly contrary to this Court's consistent teaching that States and municipalities must honor their commercial undertakings. *E.g., United States Trust Co.* v. *New Jersey,* 431 U.S. 1, 24-25 (1977); *Worthen Co.* v. *Kavanaugh,* 295 U.S. 56, 60 (1935); *Hitchcock* v. *Galveston,* 96 U.S. 341, 350 (1877). This Court is the only available forum for the enforcement of that requirement in this case, a requirement which is both the essential underpinning of public credit and an important element of the rule of law established by the Constitution. To allow the decision below—which upholds the largest repudiation of public obligations in the Nation's history—to stand would be to draw into question this Court's readiness to enforce other state and municipal obligations and thereby to encourage repudiation of such obligations and undermine confidence in the country's capital and credit markets.

ARGUMENT

The compelling reasons for review of this case are fully stated in the Petition and need not be repeated at length here. We will discuss only the importance and error of the principal substantive ruling made below, which is raised by Question 1 of the Questions Presented (Petition at i). Before doing so, however, we wish to note that even if the Constitution were to admit of the possibility of the total avoidance of public obligations on the ground they are *ultra vires*—which it does not—the decisional process below cannot be thought to have met the due process requirements of the Fourteenth Amendment. *See* Petition at 23-27; *Goldberg* v. *Kelly*, 397 U.S. 254, 269, 271 (1970); *Thompson* v. *Louisville*, 362 U.S. 199, 204, 206 (1960); *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 300 (1937). Consequently, certiorari is independently warranted by Question 2 of the Questions Presented (Petition at i-ii).

I.

This Court Has Consistently Recognized Enforcement of State Contract Obligations To Be an Important Responsibility.

A.

This case involves the largest repudiation in United States history of a public pledge of credit. The participants in the final two projects of petitioner Washington Public Power Supply System (the "Supply System") have disavowed their repayment obligations on borrowings totalling approximately $2.25 billion in principal and additional billions in interest (B3).[2] At the time the issues went into default,

[2] "A" and "B" citations are to the Appendix to the Petition for Certiorari.

the Supply System was one of the Nation's largest issuers of municipal bonds. *WPPSS Default on $2.25 Billion in Bonds Is Record for Municipal Debt; Suits Seen,* Wall Street Journal, July 26, 1983, at 3, col. 2. Its $2.25 billion default exceeds by 50 percent the total value of all municipal defaults in this country during the Great Depression. *Possible Effects of a WPPSS Bond Failure Are Visible in Past U.S. Municipal Defaults,* Wall Street Journal, July 13, 1983, at 33, col. 4.

At present, it is estimated that there are more than 1.5 million issues of public notes and bonds outstanding in this country, issued by more than 50,000 separate entities. M. HERNANDEZ & D. BRADBURY, AN ANALYSIS OF THE TAX EXEMPTION FOR STATE AND LOCAL DEBT 23 (Kidder, Peabody & Co. Sept. 1984) (hereinafter "HERNANDEZ & BRADBURY"). During 1984 alone, more than $93.3 billion of municipal bonds were sold in 5,332 separate issues. Credit Markets, Jan. 17, 1985 at 30. Of that vast sum, approximately $10.8 billion, or roughly 11.7 percent of the total dollar amount, were public-power offerings. Credit Markets, Jan. 7, 1985, at 29, col. 4.

The traditional buyers of municipal bonds are risk-averse individuals and institutions—trust departments, retirees, and persons wholly dependent upon investment income. HERNANDEZ & BRADBURY at 21. In the fourth quarter of 1983, individual investors directly owned 36.6 percent of all outstanding tax-exempt bonds and, through their investments in mutual funds, indirectly held another 24 percent of the total. *Id.* at 12. At the time of the Supply System's default, it was estimated that 60 percent to 70 percent of its bondholders were individuals. *See Huge Bond Default Touches Everybody,* Kansas City Star, July 27, 1983, at 9A, col. 3.

The devastating effect of the default on these individuals is not hard to envision. Many invested a large part of their lives' savings in bonds that were deemed investment grade securities on the basis of the participants' pledges which the Washington Supreme Court has now rendered null and void. In the wake of that court's first decision, the press was replete with stories describing the plights of many who were caused great financial hardship by the Supply System's default. *See, e.g., Default Angers, Horrifies People Who Bought the WPPSS Bonds,* Wall Street Journal, July 27, 1983, at 25, col. 4 (retired persons forced to return to work and parents no longer able to send children to college).

Perhaps less obvious, but also important, are the effects of the default on issuers in the municipal bond market. Some municipal issuers have been forced to pay an interest premium—commonly known as a "WPPSS penalty"—in order to market their offerings. *See, e.g.,* LEHMAN BROTHERS at 18. While this increment has subsided somewhat, there is no doubt that it is now more difficult to market municipal bond offerings than in the past. *See id.* at 18-19. Moreover, in order to achieve the degree of safety required by the risk-averse investors who purchase municipal bonds, many more new offerings must be insured, further increasing the cost of credit and squeezing weaker municipalities out of the market. *The Fallout From 'Whoops'*, Business Week, July 11, 1983, at 80, 87.

B.

Chief among the evils that impelled the several States to abandon the Confederation in favor of the Union was "an ignoble array of [state] legislative schemes for the defeat of creditors and the invasion of contractual obligations" to the extent that "the confidence essential to prosperous trade had been undermined and the utter destruction of credit was

threatened." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 427 (1934); 1 G. BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION 229 (1882).

This Court has consistently intervened to enforce the basic constitutional requirement that States and their corporate arms abide by their contractual undertakings:

> "When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."

Energy Reserves Group, Inc. v. *Kansas Power and Light Co.*, 459 U.S. 400, 412 n.14 (1983). The only exception in this century where the Court has sustained the alteration of a municipal bond contract occurred in the context of a municipal bankruptcy. *United States Trust Co.*, 431 U.S. at 27; *see Faitoute Iron & Steel Co.* v. *Asbury Park*, 316 U.S. 502 (1942). And, while the Court has held the Contract Clause itself applicable only to state legislative acts, *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 451 (1924), the Court has also held that contract rights are property protected by the due process clause of the Fourteenth Amendment, *Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2873 (1984); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), and that the dictates of the latter apply to state courts as to other branches of state governments, *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U.S. 226, 241 (1897).

Moreover, in order to ensure that property rights are not defeated by arbitrary state court decisions, this Court has always recognized that it falls within its

> "province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."

Ward v. *Love County,* 253 U.S. 17, 22 (1920); *accord Norris* v. *Alabama,* 294 U.S. 587, 589-90 (1935). This power of review extends to state court decisions denying federal constitutional rights on the basis of a sudden or unforseeable change in state law, such as the legal "shell game" conducted here. *Hughes* v. *Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).[3]

In reliance on the constitutionally binding character of promises by States and municipalities to pay their debts in accordance with their terms, Americans have purchased hundreds of billions of dollars of public bonds. The confident expectation of repayment upon which public finance totally depends has been created and maintained by the decisions of this Court, and it is to this Court alone that those who have relied on its teachings can look for redress when their rights are denied by a State or its instrumentalities.

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[3] The Washington Supreme Court's ruling that the participants might repudiate their agreements as *ultra vires* without incurring the equitable obligation to repay the money already advanced by the bondholders, with compensation for its use, was certainly sudden and unforseeable, as it is contrary to elementary principles of justice recognized and established in the decisional law both of that court, *Noel* v. *Cole,* 98 Wash. 2d 375, 655 P.2d 245, 249 (1982); *Edwards* v. *Renton,* 67 Wash. 2d 598, 409 P.2d 153, 157-58 (1965), and this Court, *see Chapman* v. *Douglas,* 107 U.S. 348, 355-56 (1882).

II.

The *Ultra Vires* Doctrine Articulated Below Cannot Stand Against the Constitution, and the Decision of the Washington Supreme Court Should Be Reversed Summarily.

The Supply System was created by the State of Washington through its legislature, WASH. REV. CODE ANN. § 43.52 (1983), to act as a "joint operating agency" assisting its members and participants in meeting their needs as suppliers of electricity to their respective service areas. The participants in the two Supply System projects here at issue included nine Washington cities and nineteen Washington public utility districts (the "Municipalities"). All the Municipalites were empowered by statute to contract to construct generating facilities, to contract to purchase electricity for resale, and to contract to participate in the projects of joint operating agencies, such as the Supply System, created for the purpose of providing electricity.[4]

In the exercise of the foregoing powers, the Municipalities entered into contracts with the Supply System for the financing and construction of two nuclear generating facilities and the purchase of electricity therefrom, which contracts contained "dry hole" provisions obligating the Municipalities severally to make payments to the Supply System in amounts sufficient to service their proportionate share of the debt incurred in the construction of the two facilities whether or not a single kilowatt hour of electricity was ever generated by either facility (B5-6). The Municipalities represented that they had the authority to make those com-

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[4] WASH. REV. CODE ANN. §§ 35.22.280, 35.23.440, 35.24.290, 35.27.370, 35.92.050, 35A.80.010, 54.16.040 (1965, 1983 and Supp. 1985).

mitments, their counsel concurred, and no official of the State of Washington or of the Municipalities suggested otherwise. It was on the strength of these commitments, which were and are common contractual provisions in projects of this sort, that the Supply System sold $2.25 billion of revenue bonds for the projects to the public in 14 issues over four years.

The Washington Supreme Court has now purported to abrogate these pledges of credit in their entirety on the ground they were *ultra vires* (A21, B25-26). The Washington court had to concede that the Municipalities had the power to build generating facilities (B12), the power to buy electricity (A17, B10) and the power to participate in Supply System projects (A17, B11), and seemed to suggest they had the power to enter into any kind of contract with respect to generating facilities each might separately construct (A18, B12). The only power the Washington court apparently found them to lack was the power to enter into dry hole contracts with respect to facilities they were constructing jointly through the Supply System (A18). This, the Washington court said, was because they did not "control" the Supply System (A19)—a criterion found nowhere but in the Washington court's opinion. In fact, since 20 of the 28 Municipalities had 87 percent of the voting power on the Supply System's Board of Directors, which managed its affairs (A49), and all served on the Participants Committee, which approved all contracts of over $2 million (A7-8), this criterion was met, and the Washington court's holding otherwise is so contrary to proven and indisputable reality as to violate due process. *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

Entirely apart from this Alice-in-Wonderland fact finding, however, the Washington court's invocation of "substantive *ultra vires*" as a means of abrogating the Municipalities'

obligations cannot stand in the face of this Court's decisions. Over a century ago, the Court held in words plain to legislators, judges, lawyers and investors:

> "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. . . . A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

Murray v. *Charleston*, 96 U.S. 432, 445 (1877); *accord United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 25 n.23 (1977). This doctrine has become so fundamental to the rule of law that Congress has extended it to foreign sovereigns which enter our commercial markets. *See* Section 4(a) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1606 (1982) (a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.").

When a State seeks to defeat the ordinary legal rights and justified expectations of those lending money to it or its instrumentalities, whether by act of its legislative branch or by act of its judicial branch, it contravenes the Constitution: If the action is legislative it violates the Contract Clause; if judicial it violates the Fourteenth Amendment's due process clause.

This Court long ago explicitly rejected a contention of "procedural *ultra vires*" (*i.e.*, failure to comply with internal procedures) as a defense to nonpayment by public obligors, holding that those purchasing negotiable debt instruments of such obligors are entitled to rely on official certificates of regularity. *Gunnison City Commissioners* v.

Rollins, 173 U.S. 255 (1899); *Coloma* v. *Eaves,* 92 U.S. 484 (1875). The doctrine of "substantive *ultra vires*" (*i.e.*, lack of capacity) has, of course, never been available as a defense to "ordinary individuals" (save, perhaps, infants and adjudicated incompetents) and is not so available in Washington or any other State to private corporations. WASH. REV. CODE ANN. § 23A.08.040 (1976).[5] The application of the defense by the Washington court to defeat the bondholders' rights under the circumstances presented here defies this Court's controlling decisions, and it should be reversed summarily pursuant to Rule 23.1.[6]

The Municipalities entered into contracts promising to provide the revenues necessary to service their pro-rata share of the debt incurred on their behalf; those contracts would be binding if entered into by private persons or corporations, and they are, therefore, binding on the Municipalities under the Fourteenth Amendment. The commercial bargain made by the Municipalities placed the risk of failure of the two projects involved on them, not on the bondholders, and that bargain may not be reversed because the prospect of raising utility rates to meet the Municipalities' commercial obligations is unpalatable.

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[5] The defense of *ultra vires* has been made unavailable to business corporations in 48 states and the District of Columbia by statute and in Massachusetts by judicial decision. Hawaii has no statute or reported decision mentioning the defense. Citations are set forth in the Addendum to this brief. The doctrine has been preserved only to enable shareholders to challenge corporate action in equity while a contract is executory and to sue directors who exceed their authority. *See, e.g.,* WASH. REV. CODE ANN. § 23.A.08.040 (1976).

[6] Reversal of the Washington court's holding on *ultra vires* leads to reversal of its entire decision, as the relief of the Municipalities from their obligations was the sole basis of the relief of the other participants, who are also respondents here (A25-26).

Conclusion

Certiorari should be granted and the decision below reversed summarily pursuant to Rule 23.1, on the authority of *Murray* v. *Charleston*, 96 U.S. 432 (1877), *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). Alternatively, certiorari should be granted and the case set down for briefing and argument on the merits of both Questions Presented.

Respectfully submitted,

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ADDENDUM

Statutes and Decision Denying the *Ultra Vires* Defense to Private Business Corporations

ALA. CODE § 10-2A-24 (1977)
ALASKA STAT. § 10.05.018 (1962)
ARIZ. REV. STAT. ANN. § 10-007 (1977)
ARK. STAT. ANN. § 64-106 (1980)
CAL. CORP. CODE § 208 (West 1977)
COLO. REV. STAT. § 7-3-105 (1974)
CONN. GEN. STAT. ANN. § 33-292 (1960)
DEL. CODE ANN. tit. 8, § 124 (1975)
D.C. CODE ANN. § 29-307 (1981)
FLA. STAT. ANN. § 607.021 (West 1977)
GA. CODE ANN. § 14-2-22 (1982)
IDAHO CODE § 30-1-7 (1948)
ILL. REV. STAT. Ch. 32, § 157.8 (1954)
IND. CODE ANN. § 23-1-10-4 (Burns 1972)
IOWA CODE § 496A.6 (1962)
KAN. STAT. ANN. § 17-1604 (1981)
KY. REV. STAT. § 271A.035 (1981)
LA. REV. STAT. ANN. § 12:42 (West 1969)
ME. REV. STAT. ANN. tit. 13-A, § 203 (1981)
MD. CORPS. & ASS'NS CODE ANN. § 1-403 (1975)
MICH. COMP. LAWS § 450.1301 (1973)
MINN. STAT. § 302A.165 (1984)
MISS. CODE ANN. § 79-3-11 (1973)
MO. REV. STAT. § 351.395 (1966)
MONT. CODE ANN. § 35-1-110 (1982)
NEB. REV. STAT. § 21-2006 (1983)
NEV. REV. STAT. § 78.135 (1979)
N.H. REV. STAT. ANN. § 293-A:7 (1983)
N.J. STAT. ANN. § 14A:3-2 (West 1969)
N.M. STAT. ANN. § 53-11-6 (1978)

Addendum

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N.C. GEN. STAT. § 55-18 (1982)
N.D. CENT. CODE § 10-19-06 (1976)
OHIO REV. CODE ANN. § 1701.13(H) (Baldwin 1984)
OKLA. STAT. ANN. § 1.28 (West 1953)
OR. REV. STAT. § 57.040 (1981)
PA. STAT. ANN. tit. 15, § 1303 (Purdon 1967)
R.I. GEN. LAWS § 7-1.1-6 (1970)
S.C. CODE ANN. § 33-3-30 (Law Co-op 1977)
S.D. COMP. LAWS ANN. § 472-60 (1983)
TENN. CODE ANN. § 48-405 (1984)
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UTAH CODE ANN. § 16-10-6 (1973)
VT. STAT. ANN. § 1854 (1973)
VA. CODE § 13.1-5 (1978)
WASH. REV. CODE ANN. § 23A.08.040 (1976)
W. VA. CODE § 31-1-10 (1982)
WIS. STAT. ANN. § 180.06 (West 1957)
WYO. STAT. § 17-1-106 (1977)

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I. INTEREST OF AMICUS CURIAE[1]

The City of Seattle has the largest population of any city in the Northwest. Seattle's municipal lighting department, Seattle City Light, is the seventh largest public utility in the nation. Seattle supports the certiorari petition because (1) Seattle has suffered, and continues to suffer, substantial economic injury as a direct consequence of the Washington Supreme Court's ruling that certain public utilities are excused from their contractual obligation to repay billions of dollars to bondholders and (2) the uncompensated taking consummated by the Washington Supreme Court's ruling has undermined, and will continue to undermine, the ability of many local government agencies, including Seattle, to raise needed funds in the national bond market.

In 1976, 93 Northwest utilities, including Seattle, entered into an option to purchase a percentage of the anticipated output of Washington Public Power Supply System ("Supply System" or "WPPSS") Nuclear Projects 4 and 5 ("Projects 4 and 5").[2] Eighty-eight of these utilities (but not Seattle) exercised their options and agreed to pay for the construction of Projects 4 and 5. The 88 utilities (but not Seattle) signed a Participants' Agreement obligating themselves to make repayments necessary to service the bonds (*i.e.*, repay the principal and pay the interest) issued to construct Projects 4 and 5—even if the plants were not "completed, operable or operating."[3] Construction of the plants was suspended in May 1981 and terminated in January 1982. The plants will not be completed.

In 1976, after lengthy study and debate, Seattle decided not to exercise its option to participate in Projects 4 and 5. Instead, Seattle elected to satisfy its power requirements through alternate sources, including both conservation and other generating

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1. The City of Seattle files this Brief of Amicus Curiae pursuant to Sup. Ct. R. 36.4.

2. The Supply System is a joint operating agency of the State of Washington which coordinated the financing and construction of Projects 4 and 5 for the benefit and under the supervision of the participants in Projects 4 and 5.

3. Washington Public Power Supply System Nuclear Projects 4 and 5 Participants' Agreement, at 19.

resources. Since 1976, Seattle has spent $86.6 million to pursue these alternatives. In addition, Seattle has committed to pay approximately $1.6 billion for other electrical energy projects. These costs will be paid by Seattle City Light's ratepayers.

In 1983 and 1984, through two decisions decried as "our judiciary at its worst," Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273, 298 (1984), the Washington Supreme Court effectively relieved the 88 Northwest utilities from their obligation under the Participants' Agreement to pay the principal and interest on the bonds which had been issued for the construction of Projects 4 and 5. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983) ("*Chemical Bank I*"), and *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984) ("*Chemical Bank II*"), *petition for cert. filed*, __U.S.L.W.__ (U.S. Feb. 4, 1985) (No. 84-1258).

Seattle has always honored its bond obligations. Seattle expressly decided *not* to participate in Projects 4 and 5, and it decided *not* to assume any financial obligations with respect to Projects 4 and 5. The irony is that despite these decisions, Seattle may now be required to pay costs of the uncompleted Projects 4 and 5, while some or all of the 88 participating utilities may succeed in avoiding their clear obligations. This is because Seattle is one of many defendants in a multi-billion dollar securities fraud lawsuit spawned by the surprising results of *Chemical Bank I*. The securities fraud lawsuit[4] was brought by bondholders to force the defendant utilities to honor their written agreement to provide the funds necessary to service the Project 4 and 5 bonds. Seattle is named as a defendant because Seattle is a member of the Supply System and because an employee of Seattle City Light sat on the Supply System's Board of Directors and Executive Committee.

Although Seattle is only one of many defendants in the securities lawsuit, Seattle's size and assets render it a prime

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4. *In re Washington Public Power Supply System*, M.D.L. No. 551 (W.D. Wash., transfer order filed Aug. 5, 1983); *Chemical Bank v. Public Utility District No. 1 of Benton County, et al.*, Civil Action No. C83-1080 (W.D. Wash., filed Aug. 3, 1983).

target if the bondholders prevail. Consequently, Seattle is unfairly exposed to risk in the securities fraud lawsuit, despite Seattle's deliberate decision in 1976 not to participate in Projects 4 and 5.

The three dissenting justices in *Chemical Bank II* lament that the litigation resulting from the majority's decision to relieve the participants from their obligations may expose the "entire populace of the state" to liability, "including those areas that specifically rejected participation." 102 Wash.2d at 914, 691 P.2d at 546. Seattle, which specifically rejected participation, is more severely prejudiced than the rest of the public utility defendants. Unlike many other municipalities and public utility districts in Washington, Seattle rejected participation in Projects 4 and 5 and then paid, and committed to pay, hundreds of millions of dollars to satisfy its perceived energy needs. The securities fraud lawsuit, when combined with the *Chemical Bank* rulings, raises the spectre of Seattle paying *twice* for its decision not to participate in Projects 4 and 5, while the actual participants in Projects 4 and 5 may pay nothing.

The financial impact of *Chemical Bank I* and *II* is felt in several additional ways. Seattle is forced to spend unprecedented millions of dollars in legal fees to defend itself in the securities fraud lawsuit and related actions. Seattle has experienced difficulty in obtaining required errors and omissions insurance and may have to pay increased insurance premiums as a result of the *Chemical Bank* decisions. An even more significant and prolonged harm to Northwest utilities and all local government agencies arising from *Chemical Bank I* and *II* is the lowered bond rating and "WPPSS penalty" applied by the financial community to long-term bond issues. For example, since *Chemical Bank I* Seattle has paid, and may be compelled to pay in the future, a "WPPSS penalty" of added interest on municipal bonds. This penalty threatens all local government entities in the Northwest, regardless of their participation in Projects 4 and 5, because *Chemical Bank I* and *II* establish that, at least in the state of Washington, government agencies may be allowed by the courts to renege with impunity on their bond obligations.

The long-term negative effects of *Chemical Bank I* and *II*, if those decisions are allowed to escape scrutiny by this Court, are incalculable. As an urban leader in the Northwest, as a government agency dependent upon access to the national bond market, and as a national leader among public utilities, Seattle is convinced that *Chemical Bank I* and *II*, unless reversed by this Court, portend widespread economic dislocation for the Northwest, higher interest costs for state and local governments, impaired access to the bond market for some government agencies and disaster for the institution of public power.

II. STATEMENT OF CASE

In the Participants' Agreement, the 88 utilities promised to repay the costs of constructing Projects 4 and 5 whether or not the nuclear plants were ever "completed, operating or operable." This unconditional promise was repeated in the Official Statements issued in conjunction with each of the 14 bond offerings for Projects 4 and 5.[5]

This firm commitment was supported by legal opinions, provided by attorneys for each of the 88 utilities and by independent bond counsel, which stated that the utilities had authority to enter into the Participants' Agreement. The obligation of the 88 utilities was also endorsed by the Washington State Auditor. The State Auditor certified and registered every bond issued for Projects 4 and 5;[6] the State Auditor's certification appeared on

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5. The Official Statements for the Project 4 and 5 bond offerings each included language similar or identical to the following:

> Each Participant is obligated to pay the Supply System its share of the annual total cost of the Projects, including debt service on the Bonds and the required annual payments to the reserve funds described below, *whether or not the Projects are operable or operating and notwithstanding the suspension, reduction or curtailment of the Projects' output.*

Official Statement for Project 4 and 5 Generating Facilities Revenue Bonds, Series 1977A, March 1, 1977, at 1 (emphasis added).

6. The certification and registration were required by 1959 Wash. Laws, ch. 218, § 8.

the face of every bond;[7] and the State Auditor's certification followed his determination that "the Constitution and laws of the state . . . have been properly complied with. . . ."[8]

In short, as even the majority in *Chemical Bank II* admitted, "all parties assumed that statutory authority existed" for the utilities to enter into the Participants' Agreement. *Chemical Bank II*, 102 Wash.2d at 899, 691 P.2d at 538. Seattle, while not a party to the *Chemical Bank* litigation, also "assumed that statutory authority existed" and relied upon the repeated representations of this authority in its dealings with the Supply System.

However, the Washington Supreme Court, in a total departure from its earlier decisions on municipal law, found that the Washington utility participants in Projects 4 and 5 had exceeded their authority under Washington statutes and that their entry into the Participants' Agreement was *ultra vires*. *Chemical Bank I*, 99 Wash.2d at 799, 666 P.2d at 343; *Chemical Bank II*, 102 Wash.2d at 896, 691 P.2d at 537. The Washington Supreme Court disregarded the fact that the same Washington legislature which created the purported statutory limit on the utilities'

---

7. The certification reads:

STATE AUDITOR'S CERTIFICATE OF REGISTRATION

STATE OF WASHINGTON)
) ss.
OFFICE OF THE STATE AUDITOR)

I DO HEREBY CERTIFY that I have examined the within Bond and certified copies of the resolutions authorizing the issuance thereof, and such additional information with respect thereto as is required by me, and that the within Bond has been registered in my office in accordance with the provisions of Section 54.24.070 of the Revised Code of Washington.

WITNESS my hand and seal of office this _____ day of _____, 19____.

s/ Robert Graham
Auditor of the State of Washington

By _____

s/ _____
Deputy State Auditor

8. Statement of the State Auditor included in the annual reports of the Supply System from 1976 through 1980.

authority had for years exercised control and a critical oversight role over the Supply System and the construction of Projects 4 and 5 without once questioning the utilities' authority to contract for and construct Projects 4 and 5.[9]

This case does not simply involve a state law question as to the propriety of the *ultra vires* holding by the Washington Supreme Court. Important federal rights are at stake. The Washington Supreme Court refused all equitable claims raised on behalf of the bondholders and summarily rejected the bondholders' argument that property had been taken without compensation and without due process of law. *Chemical Bank II*, 102 Wash.2d at 912, 691 P.2d at 545-46. The Washington Supreme Court's treatment of the federal constitutional claims is reviewable by this Court and, in the interest of municipalities such as Seattle, should be reviewed by this Court.

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9. For example, the 1981 Washington State Senate Energy and Utilities Committee WPPSS Inquiry report described the participants' unequivocal commitment to service the bonds as "secure financial arrangements" and further stated:

> "Hell or High Water" Clauses
>
> As their name implies, the revenue bonds *will be repaid* with revenues raised by the participating utilities from the sale of electricity. For example, bonds for WNP-4 and WNP-5 *are backed by agreements by the participating utilities with WPPSS by which they covenant* to "establish, maintain and collect rates or charges for power. . . which shall be adequate to provide revenues sufficient to fulfill their obligation to [WPPSS]". These *covenants apply "whether or not the projects are operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the projects' output".* These *open-ended commitments* are characterized by the financial community as "hell or high water" clauses *because they are obligations for repayment in all events.* "Hell or high water" arrangements rely on the participants' ability to sell electricity at whatever price from sources other than the plants under construction *to pay for their share of the construction of those facilities whether or not any or all of them are ever completed or operating. . . .*
>
> The Committee notes that all bonds that have been issued *must be repaid without regard to whatever ultimate success WPPSS may have in completing or operating any of the projects. . . .*

Report, Washington State Senate Energy and Utilities Committee WPPSS Inquiry: Causes of Cost Overruns and Schedule Delays On the Five WPPSS Nuclear Power Plants, January 12, 1981, Vol. I, at 52-53 (emphasis added).

III. SUMMARY OF ARGUMENT

Seattle respectfully urges this Court to review *Chemical Bank I* and *II* because those decisions directly conflict with this Court's interpretation of the Taking Clause and the Due Process Clause and because of the effect of those decisions on the ability of Seattle and other local government agencies to raise needed funds in the national bond market.

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980), holds that a government entity cannot, by *ipse dixit*, convert private property into public property and refuse to compensate that taking. The Washington Supreme Court, by departing from its prior decisions and excusing the participant utilities before it from their contractual obligations, achieves the exact result forbidden by *Webb's*.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), instructs that the Fourteenth Amendment's Due Process Clause guarantees an appropriate hearing before property may be taken by a government agency. The Washington Supreme Court disregarded the Due Process Clause by ruling on hotly contested material factual issues, although no evidentiary hearing was held to determine those material facts.

IV. ARGUMENT

A. Special and Important Reasons Exist For Review of this Case.

Chemical Bank I and *II* had the effect of transferring what may be a $7 billion undertaking from Northwest participants, who had expressly contracted to assume it, to the bondholders, who had been repeatedly assured by the participants that the bondholders would never have to bear the totality of this risk. This yielded a popular perception that *Chemical Bank I* and *II* are politically motivated "home town" decisions.[10]

In part because of the perception of the political character of the decisions, *Chemical Bank I* and *II* have significant national

---

10. *See, e.g.*, Comment, *Chemical Bank v. WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273, 298 (1984); Seattle Times, June 16, 1983, at B4, col. 2; Seattle Times, June 19, 1983, at D10, col. 3; Seattle Post-Intelligencer, October 7, 1983, at A7, col. 6.

implications. They encourage irresponsibility among all public entities eager to renege on politically unattractive debt and contract obligations. *Chemical Bank I* and *II* may prompt similar court challenges across the nation. At the same time, *Chemical Bank I* and *II* impose penalties, in the form of higher bond interest rates, upon responsible public agencies such as Seattle. Consequently, the legacy of *Chemical Bank I* and *II*, if those decisions are permitted to stand, will be a burden on local government units across the nation. This added burden comes at a time when the financial burdens on local government are rising dramatically as a result of the shift of responsibilities from the federal government to lower levels of government. This added burden from *Chemical Bank I* and *II* cannot be afforded by Seattle or other local government units.

The enormous economic implications of *Chemical Bank I* and *II* appear insignificant when contrasted with the constitutional implications of the decisions. The dissenters in *Chemical Bank II* were so appalled by the majority's treatment of the Taking Clause and the Due Process Clause that they specifically encouraged this Court to accept review:

> The majority fails to convincingly deal with the question of how this court can make a finding of fact on disputed evidence contrary to all our previous case law. The appellants will undoubtedly ask for federal review on this ground. In the event they do, the United States Supreme Court should exercise its discretion and accept this case for review. . . .

102 Wash.2d at 914, 691 P.2d at 546.

Chemical Bank I and *II* are so contrary to prior decisions of this Court that this case is singularly appropriate for review under Sup. Ct. R. 17.1(c).[11]

---

11. .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

. . . .

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup. Ct. R. 17.1(c).

B. Chemical Bank I and II Violate the Taking Clause and the Due Process Clause.

1. *Allowing the Utilities to Avoid Their Contractual Obligations Results in an Unconstitutional Taking.*

In *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862, 2875 (1984), this Court reiterated three factors to be examined in determining whether an unconstitutional taking has occurred: the economic impact of the governmental action, the presence of a reasonable investment-backed expectation and the character of the governmental action. Each factor points to an unconstitutional taking in this case.

First, the economic impact of the governmental action is real and substantial. The *Chemical Bank* decisions facilitated the largest bond default in the nation's history. *Chemical Bank I* and *II* consummated the shift of what may be a multi-billion dollar loss from the participants to the bondholders. Second, the investment-backed expectations were reasonable in view of the legal opinions of the utilities' attorneys and bond counsel as to the participants' authority, in view of the legislature's knowledge about and acquiescence in the terms of the Participants' Agreement and in view of the State Auditor's representations about the participants' authority.

The third indicator, the character of the governmental action, similarly evidences the unconstitutional taking that occurred. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), this Court ruled that a government agency—including a state court—cannot, simply by recharacterizing property rights, transform private property into public property:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. . . .
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the

Taking Clause of the Fifth Amendment was meant to prevent.

The recharacterization of property rights in this case was completed when the Washington Supreme Court announced that the participant utilities before it, which until then were obligated to repay the costs of Projects 4 and 5, had no obligation to repay those costs or to make restitution of the money borrowed and spent for their own public purpose.

The Washington Supreme Court reached its conclusion by making four dramatic and retroactive changes in Washington law "by *ipse dixit*." If any one of the four changes had not been made, the Washington Supreme Court would have been forced to order the utilities to honor the obligations they assumed when they signed the Participants' Agreement.

(a) The Washington Supreme Court rejected prior law and chose to interpret strictly and limit severely the powers of Washington municipalities.[12] By ignoring precedent, the Washington Supreme Court was able to conclude that the utilities acted *ultra vires*.

(b) The Washington Supreme Court rejected prior law and ruled that the purported *ultra vires* act was substantively *ultra vires*, rather than procedurally *ultra vires*.[13] By changing the rules governing the substantive/procedural distinction, the Washington Supreme Court was able to conclude that the doctrine of unjust enrichment was inapplicable.

(c) The Washington Supreme Court ruled that a bondholder *must* have sought a declaratory judgment on the authority of the issuer, else he is not entitled to recovery under equitable estoppel or estoppel by recital.[14] By creating this unexpected new requirement, the Washington Supreme Court was able to rationalize its conclusion that estoppel theories were inapplicable.

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12. *See Chemical Bank II*, 102 Wash.2d at 915-16, 691 P.2d at 547 (Utter, J., dissenting).

13. *See Chemical Bank II*, 102 Wash.2d at 931-34, 691 P.2d at 555-57 (Utter, J., dissenting).

14. *Chemical Bank II*, 102 Wash.2d at 905-06, 691 P.2d at 541-42.

(d) The Washington Supreme Court rejected prior law and ruled that the issue of whether the utilities exercised ownership control over Projects 4 and 5 is an issue of law, rather than an issue of fact.[15] By changing the rules governing the determination of the factual issue of ownership control, the Washington Supreme Court was able to conclude that the utilities acted *ultra vires*.

Certainly a state is entitled to change its laws, either through the legislature or the judiciary. But when, as here, those changes are applied retroactively to convert private property into public property (without any public purpose rationale that will withstand analysis) the state has, by *ipse dixit*, consummated the confiscation of private property. The Taking Clause requires that the confiscation in this case either be rescinded or be fairly compensated.

2. *Making Factual Determinations Without an Evidentiary Hearing Violates the Due Process Clause.*

No trial or evidentiary hearing has been held in this case. *Chemical Bank I* resulted from the appeal of an interlocutory summary judgment order. Similarly, *Chemical Bank II* resulted from a motion for reconsideration and an appeal from a summary judgment order. Although no factual hearing was conducted, the Washington Supreme Court made critical factual determinations on at least three disputed and material matters.

First, the Washington Supreme Court made the factual determination that the benefits of the bond revenues flowed solely to the Supply System, and not to the 88 participating utilities. *Chemical Bank II*, 102 Wash.2d at 911, 691 P.2d at 545. The court had no evidence on this vigorously contested issue.

Second, the Washington Supreme Court found that the utilities' control over Projects 4 and 5 was insufficient to bring the Participants' Agreement within the utilities' statutory authority

---

15. *See Chemical Bank II*, 102 Wash.2d at 931-34, 691 P.2d at 555-57 (Utter, J., dissenting). The control issue is critical because the Washington Supreme Court held in *Chemical Bank I* that if the control exercised by the utilities constituted the equivalent of an ownership interest, then the Participants' Agreement was not *ultra vires*. 99 Wash.2d at 787,666 P.2d at 337.

to construct energy facilities. *Chemical Bank II*, 102 Wash.2d at 893, 691 P.2d at 535. The Washington Supreme Court cites "evidence" of the utilities' insufficient control. *Id.* But the "evidence" was gathered and the factual determination made on this critical issue without the benefit of, or opportunity for, any trial testimony or any proof of the multitude of instances where the utilities exercised control. It was this refusal by the majority to listen to evidence on control that the three dissenters found most distressing. *Chemical Bank II*, 102 Wash.2d at 920-21, 691 P.2d at 550-51 (Utter, J., dissenting).

If the Washington Supreme Court had allowed an evidentiary hearing, the trial record would have included the minutes and transcripts of the Participants' Committee meetings. Those minutes and transcripts disprove the Washington Supreme Court's "findings" that "it seems unlikely that a part-time committee. . . could provide significant input to the management of the projects. . . ." *Chemical Bank I*, 99 Wash.2d at 787, 666 P.2d at 337, and that the "participants' committee apparently served as a rubber stamp for WPPSS' decisions. . . ." 99 Wash.2d at 788, 666 P.2d at 337.[16]

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16. Indeed, in a deposition of one of the leading members of the Participants' Committee taken in the securities fraud lawsuit on January 23, 1985, Robert McKinney testified the Participants' Committee was required, among other things, to approve: the construction budgets for Projects 4 and 5, the award of any contract or change order in excess of $2,000,000 for Projects 4 and 5, the Fuel Plan for Projects 4 and 5, and the Bond Resolutions for Projects 4 and 5. *See* Deposition of Robert McKinney, Vol. III, at 551-59. Mr. McKinney also denied the Participants' Committee was a "rubber stamp" for the Supply System's decisions. *Id.*, at 560-61. In another deposition of Participants' Committee member Donald DeFreese taken on February 4, 1985, Mr. DeFreese testified as follows:

> Q. Is it your opinion, Mr. DeFreese, that the Participants Committee acted as a rubber stamp for Supply System decisions?
>
> A. I don't know what to say. I never felt we were a rubber stamp committee.

Deposition of Donald DeFreese, Vol. I, at 191. In a third deposition taken on February 11, 1985, Edward E. Coates, who represented the City of Tacoma on the Participants' Committee, testified:

> Q. Now, during your term on the participants committee, Mr. Coates, did you believe that the participants committee was a rubber stamp for the Supply System?
>
> A. No, I don't believe that.

Deposition of Edward E. Coates, Vol. I, at 95.

Further, 20 participants in Projects 4 and 5 were also members of the Supply System. Their acquisition of approximately 70 percent of the output capability of Projects 4 and 5 has been formally identified by the State Auditor as an "equity" interest similar to the interest of a private utility in Projects 4 and 5.[17] This fact is important because the majority in *Chemical Bank II* stressed that the 88 public utilities' lack of sufficient statutory control was proved by "the more complete indicia of ownership and, therefore, control in the agreement between [a private utility] and WPPSS." 102 Wash.2d at 893, 691 P.2d at 535. These represent only a few examples of the detailed proof that could have been placed before the court on the control issue had proper judicial procedures been followed.

Third, the majority in *Chemical Bank II* made the remarkable determination that the bondholders had failed to prove "with clear, cogent and convincing evidence" their entitlement to recovery under equitable estoppel. 102 Wash.2d at 905, 691 P.2d at 542. Without a trial, how could they present such proof?

The requirements of the Due Process Clause of the Fourteenth Amendment were not satisfied. Petitioners were entitled to a hearing appropriate to this case. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). Here, only an *evidentiary* hearing would suffice. Instead, the Washington Supreme Court dispensed with an evidentiary hearing and rendered conclusions on material factual issues without the aid of a factual record.

V. CONCLUSION

The shock waves from the Washington Supreme Court's slamming of the payment windows in *Chemical Bank I* and *II* are reverberating throughout the Northwest and across the nation. Those reverberations will continue to interfere with the orderly management of local government until *Chemical Bank I* and *II* are wiped from the legal landscape.

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17. April 14, 1981 letter from the Office of the State Auditor to the Chief Accountant/Auditor of Cowlitz County PUD No. 1, at 2.

As long as *Chemical Bank I* and *II* survive, relations between local governments and the national bond market will be strained. Every unpopular project funded by bonds (*i.e.*, every unsuccessful project funded by bonds) is now a potential setting for a repeat performance of *Chemical Bank I* and *II*. Local government officials may be compelled to cry "*ultra vires*" after each failed project, unless the constitutional errors in *Chemical Bank I* and *II* are corrected.

The responsibilities of local government, especially their financial responsibilities, are quickly mounting as the "new federalism" continues to take hold. Local government units, including Seattle, simply cannot afford to have *Chemical Bank I* and *II* interfere with their access to the national bond market.

The result in *Chemical Bank I* and *II* would have been different if the Washington Supreme Court had adhered to this Court's interpretations of the Taking Clause and the Due Process Clause. This Court should grant the petition for a writ of certiorari in order to correct the substantial constitutional errors below.

Respectfully submitted,

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February 25, 1985

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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE PUBLIC SECURITIES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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IN THE

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On Petition for Writ of Certiorari to the Supreme Court of the State of Washington

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Public Securities Association (PSA) hereby respectfully moves, pursuant to Rules 36.1 and 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. The consent of petitioners, Chemical Bank and Washington Public Power Supply System, has been obtained. Consent of each respondent has not been granted. A request for consent was made to the first named respondent, Public Utility District No. 1 of Ben-

ton County, Washington, and many of the other Washington Public Utility Districts. That request was refused.

The decision of the Supreme Court of the State of Washington raises serious constitutional questions under the fifth and fourteenth amendments and article 1, section 10 of the United States Constitution. If allowed to stand, the decision may have serious impact upon the ability of state and local governments to finance their capital projects through public debt offerings.

PSA, as the representative of broker-dealers and banks that underwrite over 90 percent of municipal bond issues, has a substantial and continuing interest in the outcome of this litigation as more fully explained in the attached brief. PSA is requesting the opportunity to make its views known to the Court and to underscore and supplement the argument presented by the Petitioners.

Accordingly, PSA hereby requests that the Court grant this Motion for Leave to File Brief *Amicus Curiae* and accept the attached brief as part of the record in this case

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February 28, 1985

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BRIEF OF THE PUBLIC SECURITIES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The Public Securities Association (PSA) is a national trade organization of approximately 300 members, predominantly broker-dealers and banks. PSA's members underwrite in excess of 90% of the bonds and other obligations of state and local governments publicly sold in the United States. These obligations are commonly referred to as "municipal bonds." PSA members have underwritten municipal bonds in all 50 states and the District of Columbia. Among the purposes of PSA is the maintenance of a stable, efficient, and orderly municipal bond market. The principles at stake in this case are extremely important to these PSA purposes, and to public confidence in the municipal bond market. Accordingly, PSA and its members are vitally interested in this Court granting review.

STATEMENT OF THE CASE

The Municipal Bond Marketplace. Over 6,000 new issues of municipal bonds are marketed or placed each year in the United States. Public Securities Association, Statistical Yearbook of Municipal Finance, The New Issue Market in 1983 (1984). In 1984, the dollar amount of newly issued municipal bonds was more than $100 billion. Public Securities Association, Statistics Available in its Municipal Securities Computer Database (to be published in 1984 Statistical Yearbook of Municipal Finance). The principal amount of municipal bonds outstanding in the United States is approximately $500 billion. Board of Governors of the Federal Reserve System, Flow of Funds Accounts, Assets and Liabilities Outstanding, First Quarter 1984, No. Z.1 (March 1984). Individual investors, either directly or through unit-investment trusts and open-end bond funds, are an increasingly im-

portant segment of this market. For example, such individual investors purchased about 70% of the new issues of municipal bonds during the third quarter of 1984. Board of Governors of the Federal Reserve System, Flow of Funds Accounts, Third Quarter 1984, No. Z.1 (November 1984).

Municipal bonds are issued by state and local governments for a wide range of public purposes. Proceeds from such bonds are used to construct and maintain such public projects as roads, water and sewer lines, and schools. Such financing is critical now and access by issuers to the municipal capital markets will only become more so as issuers attempt to meet their infrastructure and other financing needs during the balance of this century. It is estimated that 80% of the capital needs of state and local government during the rest of this decade will be raised through municipal bond issues. 42 Washington Financial Reports, April 2, 1984 at 550; *see also Localities Urged to Borrow More for Infrastructure*, The Bond Buyer, April 18, 1984 at 1.

Municipal bonds are largely held by individual investors who primarily are seeking safe, reliable investments providing a specified yield and, at maturity, a return of their investment. As stated in the Petition, the Washington Public Power Supply System (WPPSS) bonds are widely held by individuals. Chemical Bank and Washington Public Power Supply System, Petition for Certiorari, at 8-9 (February 4, 1985) [hereinafter cited as Petition]. This reliance upon the safety of municipal bonds as investments has not been without foundation. Since the depression of the 1930's, there have been relatively few defaults on the tens of thousands of issues of municipal bonds in which the American public has invested. Public Securities Association, FUNDAMENTALS OF MUNICIPAL BONDS, 1-3, 113 (1981). As a result of their historical stability, municipal bonds have been highly regarded as reliable investments giving issuers ready access to the capital markets. This investment reliability is based, in

important part, upon the settled nature of municipal finance law in all jurisdictions and the willingness of issuers of such obligations to abide by their contracts.

The municipal bond market has not, however, always enjoyed a reputation for stability and reliability. After the Civil War, state and local debt was issued to finance the building of railroads. The late nineteenth century brought the onset of depression and widespread disillusionment with unfulfilled promises by railroad developers. As a result, many defaults ensued and some issuers resorted to bond contract repudiation in an attempt to avoid payment. These repudiations were widely and fiercely challenged in the state courts and over two hundred of these challenges reached this Court. This Court almost invariably upheld the validity of the bonds and ordered municipal payment. In the end, the practice developed of obtaining independent legal opinions attesting to the legality of such municipal debt obligations. This development restored the market's reliability and efficiency.[1] *See* VI C. Fairman, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 918-1101 (1971); Public Securities Association, FUNDAMENTALS OF MUNICIPAL BONDS, 32-35, 47-48 (1981).

The practice of relying upon bond counsel opinions, and the market acceptance of those opinions, not only allayed concerns borne of the post-Civil War experience but also avoided the need to seek prior judicial approval of all potential questions concerning bond issuance. Necessarily, such opinions are based upon the application of judicial precedent and relevant legal principles. With great frequency it is necessary for counsel to apply established legal principles to a particular point of interpretation that has not been expressly determined by the courts. It is of no small importance that counsel be able to rely

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[1] Fairman writes of the period: "Eventually this wasteful experience ran its course. The regularity and confidence essential to sound municipal borrowing was attained by such developments as the rise of bond counsel . . . ." *Id.* at 1101.

upon the reasonable and natural application of such legal principles. It would be impossible to maintain the efficiency of the current municipal bond market if prior judicial determination was necessary in all, or even most, instances. Only a small number of new issues are presently examined by the courts prior to issuance. If the thousands of issues newly marketed each year required prior judicial decision, the courts would have time for little else and the market would be stultified.

The Decision Below. In this case, thousands of investors from across the nation have relied upon opinions of counsel proffered by the respondents as participants in the projects. Those counsel opined that the participants had the legal authority to enter into the contracts that very explicitly bound them to make certain payments whether or not the projects were completed, thus assuring the purchasers of the bonds that they would be repaid even if the projects failed. The participants also expressly represented that those obligations were duly authorized and validly given. Those opinions, and the participants' representations, were based upon existing statutory authority and prior judicial decisions. And as the Washington Supreme Court noted: "all parties assumed that statutory authority existed." *Chemical Bank* v. *Washington Public Power Supply System*, 102 Wash. 2d 874, 899, 691 P.2d 524, 538 (1984) [hereinafter cited as *Chemical Bank II*].[2]

Yet, in spite of that unanimous assumption, which was confirmed by legal opinions and formal governmental action, the Washington Supreme Court overruled the trial court determination of contract validity and held that many of the participants were without authority to enter into the financing commitments. It did so in a decision noteworthy, to put it mildly, for its breach of the rule of *stare decisis*. The majority opinion conveys the im-

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[2] *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wash. 2d 722, 666 P.2d 329 (1983) will hereinafter be cited as *Chemical Bank I*.

pression of a single-minded effort to achieve a result that fully discharges the participants from all their obligations and deprives bond investors of their reasonable expectations. That opinion arbitrarily, categorically, and perfunctorily dismissed every conceivable ground that might support repayment of the bondholders. The majority dismissed claims of statutory authority under Washington statutes that (1) grant authority to purchase electricity [RCW 54.16.040; RCW 35.23.440 (44); RCW 35.24.290(3); RCW 35.27.370(4); RCW 35A.80.010; RCW 43.52.410], (2) give broad authority to WPPSS as a joint operating agency [RCW ch. 43.52], including a provision that such chapter be construed liberally [RCW 45.52.910], and (3) allow many of the participants to construct energy facilities [RCW 35.92.050]. After concluding that the participants had no authority to enter into the financing agreements that contained so-called "dry hole" obligations, the majority dismissed, with equal quickness and lack of substantive support, the equitable claims of estoppel and restitution. This denial of all remedy has been uniformly criticized by legal commentary as being an unsupportable and unpredictable result under pre-existing Washington law.[3]

The surprising and arbitrary nature of the majority opinion is most apparent from the strong dissent of three of the nine Justices of the Washington Supreme Court. In their dissent, those Justices make it clear that, in their view, the majority adopted special rules of statutory interpretation and imposed new requirements for statutory

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[3] *See* Witten & Hecht, *Whoops, There Goes Washington: Is California Next?*, 15 Pac. L.J. 955 (1984); Note, *Chemical Bank* v. *Washington Public Power Supply System: The Questionable Use of the Ultra Vires Doctrine to Invalidate Governmental Take-or-Pay Obligations*, 69 Cornell L. Rev. 1094 (1984); Comment, *Chemical Bank* v. *WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. & Pol'y 273 (1984); Comment, *Chemical Bank* v. *Washington Public Power Supply System: An Aberration in Washington's Application of the Ultra Vires Doctrine*, 5 U. Puget Sound L. Rev. 59 (1984); Note, *A Cry for Reform in Construing Washington Municipal Corporation Statutes*, 59 Wash. L. Rev. 653 (1984).

application; applying both retroactively to deprive the investors of their contract and property rights in order to avoid the imposition of increased utility charges on those who are voters in the State of Washington.[4] The unfortunate implication is that an elected state court, in grappling with an unpopular case, may have permitted political considerations to tip the scales of justice.

As a result, legal commentators, the investment community, and the public at large are understandably skeptical of the Washington Court's decision. The decision has been referred to as "strange" and "corrupting," [5] "dishonest" and protectionist,[6] and a politically popular decision [7] rendered by an "elected tribunal." [8] The Christian Science Monitor stated the premise bluntly: "Many investors regard the decision as political rather than legal. They believe the courts were searching for a way to bail out the utilities." [9]

This skepticism not only taints the credibility of the judiciary and undercuts our shared notions of political fairness but also impairs confidence in the municipal finance market to the detriment of all state and local governments. The dissent expresses understandable concern about the probable effects of the majority's decision upon the ability of Washington municipalities to finance their capital projects. *Chemical Bank II*, 102 Wash. 2d at 917, 691 P.2d at 548 (Utter, J., dissenting). And, public reaction to the WPPSS default suggests that the Washing-

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[4] *Chemical Bank II*, 102 Wash. 2d 874, 913, 691 P.2d 524, 546 (1984) (Utter, J., dissenting).

[5] *Up From Whoops*, Wall Street Journal, August 13, 1984, at 15.

[6] Comment, *Chemical Bank* v. *WPPSS: A Case of Judicial Meltdown*, 5 J. Energy L. and Pol'y 273, 298 (1984).

[7] Note, *A Cry For Reform In Construing Washington Municipal Corporation Statutes*, 59 Wash. L. Rev. 653, 660 (1984).

[8] *After Default the Questions of Blame and Duty Linger*, Washintgon Post, December 5, 1984 at 1, 16, col. 1.

[9] *Financial Fallout from Washington State's Bond Blast*, Christian Science Monitor, June 20, 1983 at 10, 11, col. 1.

ton decision has had a costly effect upon the bond market and bond prices.[10] True, such an effect may be ameliorated over time, as the market assesses whether *Chemical Bank II* can safely be characterized as an aberration. Still, so long as the decision below stands, the impression will nevertheless remain that at least one state court, in a case involving the largest default in municipal bond history, felt constrained to permit local financial exigencies to affect its application of legal precedent.

For these reasons, this Court should review the decision of the Supreme Court of Washington. Without such review, the underlying principles upon which municipal bond financing currently operates efficiently may be eroded, just as it was in the late nineteenth century. Fortunately, review was then granted and the foundations of public finance—the obligation of contract and legal predictability—were preserved. To allow the Washington Supreme Court decision to go unreviewed may prompt other state and local governments to resort to, or at least attempt to obtain, state court protection as an alternative to honoring the obligations of financial contracts that in hindsight prove to have been made for unsuccessful projects. Such a development could well undermine what is currently an efficient, effective, and very

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[10] *See A Belt and Suspenders,* Forbes, December 5, 1983, at 250, 250-251 (WPPSS "has done for bond sales what Baldwin-United has done for annuities."); *Whoops A $2 Billion Blunder*; *Fallout From a Record Default Spreads From Washington State to Wall Street,* Time, August 8, 1983, at 50 (investor confidence shaken); *All WPPSS Bonds Seen in Jeopardy Without BPA Aid,* The Bond Buyer, September 12, 1983, at 1 (WPPSS uncertainties have led to an interest rate increase of about 150 basis points for municipal bonds.); *Analysts Assess WPPSS Fallout,* Engineering News-Record, August 4, 1983, at 10 (WPPSS default "threw the whole system into question—the value of a legal opinion, the value of a rating. Utilities will . . . have to pay higher yields." quoting G. Friedlander, vice president at Smith Barney, Harris Upham & Co.); *Bank Makes Move To Force Record Bond Default,* Washington Post, July 23, 1983, at 1 (default could "cost municipalities hundreds of millions of extra dollars in financing charges").

desirable public finance marketplace to the detriment of not only all participants in that market but also the nation as a whole.

SUMMARY OF ARGUMENT

As demonstrated by the Petition, the Washington Supreme Court decision raises substantial federal questions under the Taking, Contract, and Due Process Clauses of the United States Constitution. We wish to emphasize the interests of bondholders and the unfortunate effect of that decision on the municipal bond market and to urge, from that perspective, that issues arising under both the Taking Clause and the Contract Clause require review by this Court. Specifically, the governmental inducement of the bondholders' investment and the subsequent denial of all remedies—including even simple restitution—are, from a municipal bond market perspective, the most pernicious aspects of the Washington Court's decision when reviewed under the Taking Clause. Similarly, from that perspective, a review of the Washington Court's decision under the Contract Clause is fully warranted under the particular circumstances here presented.

More generally, this case uniquely calls for the application of the constitutional principles underlying both the Taking Clause and the Contract Clause to eliminate the fundamental evil against which those clauses stand—the imposition of arbitrary or political actions or decisions that would reallocate wealth solely on the basis of regional or political favoritism.[11] Indeed, those principles must be applied in this case where state agency repudiation of contractual obligations is upheld by a state court decision, uniformly criticized for its protectionist focus and cavalier denial of remedial relief, that results in bil-

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[11] *See* Sunstein, *Naked Preferences And The Constitution*, 84 Colum. L. Rev. 1689 (1984). Many of the clauses of the Constitution focus on a single underlying evil: "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." *Id.* at 1689.

lions of dollars being transferred from the pockets of bondholders comprised primarily of out-of-state residents to the pockets of Washington state residents.

ARGUMENT

I. The Participants Have Unconstitutionally Taken The Bondholders' Property.

The cancellation of the participants' agreements, and the resultant transfer of billions of dollars from the bondholders to the participants and their ratepayers, amounts to a taking of private property in violation of the fifth amendment of the Constitution. The Washington Court in countenancing such contract repudiation not only upheld such action—but also eliminated all remedial relief—even the minimally compensatory right of restitution.

Petitioners have argued, and we agree, that the participants' abrogation of their contracts and retention of over two billion dollars in principal amount constitutes an unconstitutional taking under the decisions of this Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978) and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). Two particularly outrageous aspects of the participants' actions draw special attention.

A. The Participants' Inducement and Subsequent Destruction of the Bondholders' Investment is an Unconstitutional Taking of Property.

This Court has held that government may not induce an investment, thereby creating a legitimate investment-backed expectation of private property, and then destroy that expectation by taking the property without just compensation. *Ruckelshaus* v. *Monsanto Co.*, 52 U.S.L.W. 4886, 4892, 81 L.Ed 2d 815, 838 (1984) ("explicit governmental guarantee formed the basis of a reasonable investment-backed expectation"); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979).

There could be no clearer example than this case of intentional, governmental inducement leading to the

creation of an investment-backed expectation, followed by its destruction by the government. The participants contracted with and directed WPPSS; the participants hired counsel to give opinions; the participants entered into the bond financing transaction with clear awareness of the "dry hole" provision and its market significance; the participants allowed and authorized that transaction to go to the public bond market with the representation that the "dry hole" provision secured repayment of the bonds; indeed, the participants authorized WPPSS to go to that same public market *fourteen* times with that same representation. Thus participants intentionally and knowingly induced a $2.25 billion transfer of principal from private bondholders. After such transfer, and when their projects failed, the participants willfully destroyed the security for the bonds thereby eliminating all source of repayment.

The proposition that government may not encourage the private sector to incur investment costs and then proceed to take the completed investment without compensation is at least as applicable here as in *Kaiser*. Indeed, the governmental activity in *Kaiser* was mild compared to the participants' actions. The Army Corps of Engineers in *Kaiser* merely consented to the dredging of a pond and construction of a channel—activity that ultimately created a navigable body of water that the government claimed thereby became subject to public use. Yet, the Court in requiring compensation noted the government's inducement: "While the consent of individual officers cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Kaiser*, 444 U.S. at 179 (citations omitted). It does not require intense analysis to view *Kaiser* as teaching that, while the unauthorized actions of individual officials may not contractually bind the municipality, they can lead to the fruition of expectations that at least must be paid for if taken. Certainly, the participants actively induced the

investment. It would be as if the Army Corps of Engineers in *Kaiser* had sought out the developer and given him a written guarantee that the completed marina would be his, instead of merely allowing the investment to be made.

Furthermore, like the developer in *Kaiser*, the bondholders did not accept the risk of confiscation of this governmentally induced investment. The bondholders took the risks normally assumed in the municipal bond market, namely that the value of their bonds might decrease and/or that the participants might default by reason of an *inability* to pay. Under no circumstance did the bondholders willingly take the risk that the participants might simply decide not to pay or more incredibly, that any decision to back out would be countenanced by the Washington Supreme Court in a decision that appears to create law solely to produce a preordained result. To assert that the bondholders took the risk of calculated breach of contract undercuts the very concept of contract, particularly in the municipal bond market. Fortunately, the Washington Court may not constitutionally use its *ex post facto* realignment of bondholder/participant risks to vindicate the participants' taking of the bondholders' investment. *Cf. Hughes* v. *Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("a sudden change in state law, unpredictable in terms of relevant precedents . . . cannot be permitted to defeat" the Taking Clause). The fact is the bondholders made a loan to the participants—not a gift—and the "dry hole" provision not only induced the marketing of the bonds, but also determined precisely the allocation of risk. In sum, the bondholders held indebtedness, not equity, and assumed the market and default risks inherent in any municipal bond transaction. The participants obtained the benefit of the financing in support of their projects and assumed the risk that such projects might not be as successful as predicted or would even fail totally.

B. The Participants' Retention of the Principal Amount is an Unconstitutional Taking of Property.

The Washington Court, by denying any restitutionary remedy, has sanctioned the participants' unconstitutional taking of the bondholders' funds. To justify this result, the Washington Supreme Court concluded that the proceeds received from the sale of the bonds only benefited WPPSS as the joint operating agency and that, therefore, no restitution was due from the participants. *Chemical Bank II*, 102 Wash. 2d at 911, 691 P.2d at 545. This conclusion, however, ignores the fundamental facts. The participants caused WPPSS to act as their agent. Independent of the participants, WPPSS had no intention, no need, indeed no ability, to build the projects for which the bonds were issued. WPPSS was conceived, designed, and employed as nothing more than a conduit on behalf of, and for the convenience of, the participants. Thus, under any possible, fair analysis the benefit of the bond proceeds was intended for and ran to the participants. It was precisely to obtain such benefit, by assuring bond marketability, that the participants offered the "dry hole" inducements. *See United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 18 (1977) (Bond marketability is a recognizable benefit.). WPPSS by itself could not, nor did it desire to, market a single bond for the projects without the involvement of, or except for the benefit of, the participants.

More to the point, is the question of by whom was the property destroyed. *See Ruckelshaus* v. *Monsanto Co.*, 52 U.S.L.W. 4886, 4891, 81 L.Ed 2d 815, 833-34, (1984); *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) ("deprivation of the former owner rather than accretion of a right or interest to the sovereign constitutes the taking"). And, as to that determinative question there is no dispute but that the participants are solely responsible for the destruction of the bonds' value. It was the abrogation by the participants of their commitment to provide security for the bonds, and not failure of the projects, that destroyed the bonds' value. It is, ultimately, irrelevant whether WPPSS or the participants

received the benefit of the bonds. What is dispositive and beyond argument is the act of destruction and the actors involved: the participants' repudiation of contract and retention of principal as sanctioned by the Washington Supreme Court.

The Washington Court's decision also foreclosed any restitutionary remedy whatsoever on the basis of its conclusion that participants' assumption of "dry hole" obligations was substantially *ultra vires*. *Chemical Bank II*, 102 Wash. 2d at 910-911, 691 P.2d at 544-45. Even if one could accept the Washington Court's questionable interpretation of municipal authority, it cannot be plausibly asserted that such "authority . . . [was] so completely lacking it seems fair to presume bad faith on the part of the private party [bondholders]." *Noel* v. *Cole*, 98 Wash. 2d 375, 381 n.3, 655 P.2d 245, 250 n.3 (1982). Yet that bad faith presumption is necessary for a finding of substantive *ultra vires* and a denial of restitution under Washington law.[12] It is fundamentally indefensible for

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[12] The *Noel* court held that the lack of authority there alleged did not render the contract substantively *ultra vires* and hence restitution was awarded. The Court used a two part *ultra vires* test: (1) "the agency must have had the power it sought to exercise but merely have exercised it in an irregular manner or by unauthorized procedural means," and (2) "the action must not be *malum in se*, *malum prohibitum*, or manifestly against public policy." The Court held that the state "had the general authority to sell the timber rights" and the action was not so against public policy as to presume bad faith. *Noel*, 98 Wash. 2d at 381-82, 655 P.2d at 249-50.

Substantive *ultra vires* may defeat the demand for payment where no reasonable person could have thought the act authorized or if there is an express prohibition of the power purportedly exercised. *See* 10 E. McQuillin, MUNICIPAL CORPORATIONS, § 29.131 (3rd ed. 1981). It cannot be said either that there was a clear lack of authority to enter into the Participant Agreements or that the bondholders acted in bad faith. The Washington Court acknowledged that authority to enter into the "dry hole" obligations existed, if either control or ownership had been maintained by the participants. Moreover, it is beyond dispute that all concerned parties believed in good faith that the "dry hole" obligations were valid.

the Washington Court to have held that the participants' failure to exercise sufficient control over the projects—a requirement nowhere set forth in any relevant statute or imposed by prior judicial decision—amounts to substantively *ultra vires* activity. Indeed, it is disingenuous for the Washington Court to assert that there was a complete lack of authority for the participants' contracts when, prior to the decision in *Chemical Bank I*, the Washington legislature itself deemed it necessary to enact express restrictions on the authority of public bodies to conclude the "dry hole" contracts. *See infra* note 16. Moreover, both the trial court and three members of the Washington Court itself did not find the lack of authority in this instance to be clear. In that light, it is difficult to assert, much less conclude, that the bondholders either acted in bad faith or in disregard of the participants' complete "lack of authority." The Washington Court's finding of substantive *ultra vires*, however, rests entirely upon that flawed premise.

Except in the most extreme circumstances, municipal corporations have not been permitted to cite lack of authority to contract or incur indebtedness as a basis to enrich themselves by excusing their obligations to repay funds advanced. Many years ago, this Court held that: "While . . . the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. . . . '[T]he obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property without authority, the law, independent of any statute, will compel restitution or compensation.'" *Louisiana* v. *Wood*, 102 U.S. 294, 299 (1880) (quoting *Marsh* v. *Fulton County*, 77 U.S. (10 Wall.) 676, 684 (1871)); *see also Logan County National Bank* v. *Townsend*, 139 U.S. 67 (1891); *Parkersburg* v. *Brown*, 106 U.S. 487 (1883); *Gillespie* v. *Yell County*, 124 F.2d 632, 637 (8th Cir., 1942) ("Persons who have innocently paid their money for [invalid] bonds are universally held to be entitled to recover . . . ."). Professor Palmer has similarly considered and addressed this issue. "It would

be a manifest injustice to permit a municipality to borrow money pursuant to an invalid promise to repay it, retain the money, or use it for a proper municipal purpose, and yet not be accountable for the enrichment." II G. Palmer, LAW OF RESTITUTION, § 12.18, at 670 n.11 (1978).

The underlying purpose and effect of these decisions is in accord with the Taking Clause. Just as a state may not arbitrarily redefine property rights, similarly it may not arbitrarily redefine, by "ipse dixit," contract rights or equitable remedies that amount to property interests. *Cf. Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Hughes* v. *Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Absent bad faith on the part of the lender, a municipality may not borrow money, albeit without authority to do so, and then refuse to repay the loan.[13] The Taking Clause prohibits such confiscation unless: (1) municipal authority is so completely lacking as to negate any inference of governmental action and to suggest bad faith on the part of the lender, or (2) the award of restitution would substantially undercut an express, legitimate state interest.[14] To read the Taking Clause in a more restrictive manner would gut it of any meaning in the municipal finance context. A municipality could always manage to borrow funds "illegally" and thereby avoid repayment pursuant to its contract, as well as the requirement of just compen-

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[13] *Cf. Murray* v. *Charleston*, 96 U.S. 432, 445 (1878) (a sovereign right to withhold or alter the terms of payment cannot be read into state contracts). *Murray* also must be read as disallowing a claim that special and obscure rules govern municipal authority to borrow and hence the obligation to repay. *Murray* minimally requires a restrictive *ultra vires* doctrine—only the most egregious (and therefore notorious) lack of authority, leading to the presumption of bad faith, can relieve the municipal obligation to return monies or benefits received in consideration for an invalid contract.

[14] Compare contracts made in direct violation of public bidding statutes. The award of quasi-contractual relief in such an instance would completely undermine the statute by allowing the municipality to reap the services and the contractor to be paid fair value. *See e.g., Gerzof* v. *Sweeney*, 22 NY2d 297, 239 N.E.2d 521 (1968).

sation. This would elevate municipalities to a level of sovereignty this Court found unacceptable a century ago. *See e.g., Murray* v. *Charleston*, 96 U.S. 432 (1878). And, if supported by decisions like *Chemical Bank II*, it would weaken to the detriment of all municipalities the reliability of contractual obligations on which the municipal bond market has rested since this Court's early repudiation of such conduct.

II. The Washington Supreme Court's Decision Unconstitutionally Impairs The Obligation Of Contract.

An apparent hurdle to an assessment of the Contract Clause issue present in this case is the Washington Court's conclusion that no authorized contract ever existed. However, a state court's interpretation as to the existence of a contract is necessarily reviewable as a question of federal constitutional law when the Contract Clause is implicated. *Appleby* v. *City of New York*, 271 U.S. 364 (1926); *cf. Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980); *Hughes* v. *Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Thus, the Washington Supreme Court's attempt to deny the existence of the contract by "ipse dixit" or arbitrary change of state law, begins rather than precludes a "Contract Clause" inquiry.

The Washington Supreme Court's retroactive denial of municipal authority and release of the participants from their "dry hole" obligations is an unconstitutional impairment of the bondholders' contracts. The Contract Clause prevents the abrogation by a state of its own indebtedness. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 17 (1977). Indeed, a state's abrogation of its own obligations is the most worrisome of contract impairments. State self-interest can, in such an instance, overwhelm traditional checks upon state action. This is especially true in the municipal bond context where the state has only a purely financial interest at stake. Indeed, only once in this century has alteration of a municipal bond contract been sustained by this Court and that was a case

where a bankrupt municipality was placed in receivership. *United States Trust*, 431 U.S. at 27 (citing *Faitoute Iron & Steel Co.* v. *City of Asbury Park*, 316 U.S. 502 (1942)). In this case, the participants, the bondholders, the trial court, the dissent in *Chemical Bank II*, legal commentary on that decision and, perhaps, even the Washington legislature all found, at one time or another, authority for the contracts under the applicable Washington statutes and prior Washington decisions governing statutory interpretation. The surprising opinion of the Washington Supreme Court, however, released the municipalities from their contractual obligation to provide the bond payments. Unless this Court grants certiorari and reverses the decision below, the municipal participants, having signed a contract pledging payment and having received its benefits for five years, will have successfully repudiated their contractual obligations when it appeared that they would become unexpectedly burdensome.

This Court's decision in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), does not preclude the Washington Court's decision from being subject to constitutional review under the Contract Clause. The policies behind *Tidal Oil* would not be disserved by reviewing the decision below under the Contract Clause. *Tidal Oil* was designed to avoid common law distortion by preventing every state court decision from becoming of constitutional dimension. Additionally, the exclusion of judicial decisions rested upon the belief that it is legislative misbehavior with which the Contract Clause was primarily concerned. *See* Epstein, *Toward A Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 747-48 (1984). *Tidal Oil*, however, need not be read as precluding a review of state judicial abrogation of municipal financial obligations when it is apparent that such judicial action is merely serving as a substitute for, or an extension of, state legislative action.

Rather, in such situations state judicial review of contract authority, like state legislative impairment of such

contracts, should be subjected to more exacting review. *See United States Trust*, 431 U.S. at 26; *see also* Note, *A Process Oriented Approach to the Contract Clause*, 89 Yale L. J. 1623, 1627 (1980); Note, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. Pa. L. Rev. 167, 187-90 (1976). The deference normally given to state court determinations cannot be justified when the impression is uniformly created among impartial observors that political considerations or regional preference may have influenced the reasoning proffered in support of those determinations.[15]

Moreover, this Court has undertaken review of state judicial decisions under the impairment clause when those decisions give effect to or enforce legislative action. *Tidal Oil*, 263 U.S. at 453 (citing with approval *Louisiana R. & Nav. Co.* v. *Behrman*, 235 U.S. 164, 170-71, (1914) and *Carondelet Canal Co.* v. *Louisiana*, 233 U.S. 362, 376 (1914)); *see also Columbia R. Co.* v. *South Carolina*, 261 U.S. 236, 245 (1923) ("[A]lthough the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appears, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches."); *Cross Lake Club* v. *Louisiana*, 224 U.S. 632, 638-39 (1912) ("[W]hen the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired a federal question is presented."); *Terre Haute & I.R. Co.* v. *Indiana*, 194 U.S. 579 (1904). This result is supported by the legitimate concern that state self-interest in such circumstances has permeated the state judiciary. *See Mariniello* v. *Shell Oil Company*, 511 F.2d 853, 859 (3rd Cir., 1975) (In both *Columbia Railway* and *Terre Haute* this Court was confronted with

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[15] This Court's admonition in *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 206-07 (1864) is worth recalling: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

state court decisions that "worked a substantial forfeiture of land or money in favor of the state government.").

In this case, the inference that the Washington Supreme Court, by its forced approach to statutory interpretation, may have been extending legislative action is clearly present and urges review by this Court. In this respect it should be noted that the Washington legislature banned unlimited "dry hole" commitments after the WPPSS default but before the decision in *Chemical Bank I*.[16] While the Washington Supreme Court did not expressly rely on the statutory amendment, it did acknowledge the enactment in a different context. More importantly, the result of its strained statutory interpretation was to give retroactive effect to the amendment as a practical matter. If, as unfortunately seems apparent, the Washington Court has chosen to join the fray by rendering a decision that seems little more than a practical replacement for legislative action, then by that choice it has made its decision subject to review as constituting an unlawful impairment of contract.

CONCLUSION

By its decision in *Chemical Bank II*, the Washington Supreme Court would push concepts of municipal finance back to the late nineteenth century, to the immediate relief of the participants but the continuing distress of the municipal bond marketplace. Fortunately, in that earlier era, this Court refused to permit municipal governments to repudiate their obligations just because the projects for

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[16] RCW 43.52.410 amended in 1983 to add the proviso: "[N]o city or district may enter into a contract or compact with an operating agency to purchase electric energy, or to purchase or participate in a portion of an electrical generating project, that commits the city or district to pay an amount in excess of an express dollar amount or in excess of an express rate per unit of electrical energy received." 1983 Wash. Laws, ch. 308 §1. This amendment passed the Washington Legislature April 22, 1983 and was approved by the Governor of Washington on May 17, 1983. *Chemical Bank I* was decided June 15, 1983.

which those obligations were assumed turned out to be unsuccessful or unpopular. Although the constitutional landscape has changed significantly in the past 100 years, the fundamental concepts protecting the property rights of citizens from abrogation by state and local government have not been abandoned. The application of those concepts to this case produce the conclusion that the Washington Court's reconstruction of state law constituted an impairment of the bondholders' contracts and that the participants' retention of the bondholders' funds constituted an uncompensated taking of private property. A review of this case by this Court is fully warranted, *inter alia*, to assure the application of those fundamental constitutional concepts for the protection of, and the maintenance of continued confidence in, the municipal bond market.

Amicus, therefore, respectfully suggests that the petition for a writ of certiorari to the Supreme Court of Washington should be granted.

Respectfully submitted,

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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of the State of Washington unconstitutionally manipulate Washington state law to deprive investors in tax-exempt municipal bonds of their property or due process rights where it twice reviewed the municipal authority and equitable relief questions at issue in a comprehensive, reasoned, and unbiased manner?

2. Did the respondent Washington public utility districts and cities unconstitutionally deprive investors in tax-exempt municipal bonds of their property rights by complying with the decision of the Supreme Court of the State of Washington that they did not have legal authority to enter into an agreement to purchase energy capability, and where, prior to that decision, Respondents took all reasonable steps to plan and provide for investor repayment pending judicial resolution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages iii-v of the Petition for Certiorari correctly identify the parties to this litigation. This Brief in Opposition to Petition for Certiorari is submitted by certain respondent Washington public utility districts and one Washington city, collectively referred to as the Washington Public Utilities Group. The Washington Public Utilities Group is comprised of the following: Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of Clark County, Washington; Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 3 of Mason County, Washington; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 2 of Pacific County, Washington; Public Utility District No. 1 of Skamania County, Washington; and, the City of Tacoma, Washington. The Washington Public Utilities Group represents shares of Washington Public Power Supply System Nuclear Projects 4 and 5 ("WNP 4 and 5") comprising approximately 45%.

This Brief in Opposition to Petition for Certiorari will address only those alleged constitutional issues purportedly arising from the decision of the Supreme Court of Washington which relate to municipal authority and equitable relief against Washington municipalities. Issues unique to Respondents who are not Washington public utility districts or cities will not be examined in this Brief.

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CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

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V.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

BRIEF OF WASHINGTON PUBLIC UTILITIES GROUP IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, the Washington Public Utilities Group, respectfully pray that this Court deny the Petition for Certiorari submitted by Chemical Bank and the Washington Public Power Supply System.

OPINIONS BELOW

The recitation of the proceedings below at pages 1-2 of the Petition for Certiorari in general is an accurate summary.

JURISDICTION

These Respondents respectfully disagree with Petitioners that this Court has jurisdiction to review the judgment of the Supreme Court of Washington at issue.

Review on writ of certiorari to this Court of an opinion of a state court of highest jurisdiction interpreting state law may be granted only if there is a substantial federal question. United States Supreme Court Rule 17.1. Contrary to Petitioners' assertions, and despite the dollar amounts involved, there is no substantial federal question arising from this lawsuit.

Petitioners attempt to constitutionalize purely non-constitutional state law issues, just as they have repeatedly attempted in the state court litigation. Furthermore, many of the issues Petitioners attempt to raise here were squarely raised and rejected by this Court in denying these same Petitioners' Petition for Certiorari in *Chemical Bank and Washington Public Power Supply System v. Asson*, No. 83-1619 (October Term, 1983).

Moreover, even a cursory examination of the Petition for Certiorari quickly reveals that Petitioners' real case is a series of alleged misrepresentations by Respondents. Over and over, throughout the Petition, the focus is upon Respondents' "promises", "assurances", "persuasion", and the like. Petitioners are, in essence, attempting to litigate Chemical Bank's federal district court securities lawsuit before this Court by means of an unfounded characterization of the outcome of state law litigation as rising to federal constitutional proportions simply because the result was unfavorable to them. Petitioners also claim that they and the bond purchasers they represent are totally without other avenues of possible relief. Nothing could be further from the truth.

Petitioners only briefly allude to the massive lawsuits brought by Chemical Bank and WNP 4 and 5 bond purchasers (a class action), which are now being vigorously litigated in the United States District Court for the Western District of Wash-

ington. *Chemical Bank v. Public Utility District No. 1 of Benton County, et al.*, C83-1080 (1983); *In Re Washington Public Power Supply System Securities Litigation*, MDL-551 (1983). These two actions have been consolidated for discovery purposes with a third lawsuit brought by an indemnity company which insured bond purchasers against the risk of loss on their investment in WNP 4 and 5 bonds. *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, Washington, et al.*, C84-690 (1984). All three of these suits, which are brought against scores of defendants, allege numerous violations of federal and state securities laws as well as common law fraud, negligent misrepresentation, and negligence.[1]

The consolidated federal actions are proceeding expeditiously, with production of literally tens of millions of pages of documents having been completed. Multi-track depositions are presently in progress, with a trial date of March, 1986 scheduled.[2]

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[1]The complaints in these actions consist of approximately 350 pages of allegations against the 88 utility Respondents and other defendants, including: the Washington Public Power Supply System and its Board of Directors; WNP 4 and 5 Participants' Committee members; Blyth Eastman (the Supply System's financial advisor); Merrill Lynch, Salomon Brothers, Smith Barney, and Prudential-Bache (lead underwriters for WNP 4 and 5 bond issues); R. W. Beck (consulting engineer); Ebasco Services and United Engineers & Constructors (architect-engineers); Wood & Dawson and Houghton, Cluck, Coughlin & Riley (Supply System bond and special counsel, respectively); and the Bonneville Power Administration.

[2]In addition to the federal actions, a state court suit brought by bondholders, including American Express Subsidiaries and U.S. Trust Company, against many of the same defendants and others, including the Supply System's auditor, Ernst & Whinney, based upon Washington state securities laws, misrepresentation, negligence, and various equitable theories, is pending in the Superior Court for King County, Seattle, Washington. *Haberman, et al. v. Washington Public Power Supply System, et al.*, No. 84-2-06452-8 (1984). A group of bond purchasers has sued the State of Washington based upon allegations concerning its involvement in WNP 4 and 5. *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (Superior Court for King County, 1984).

Based upon this plethora of lawsuits naming scores of defendants, Petitioners' lament that they and those they represent are totally without possible remedy cannot be taken seriously. To the contrary, the pending federal and state litigation clearly indicates that avenues of relief to WNP 4 and 5 bond purchasers are far from being exhausted.

Faced with an insurmountable obstacle to United States Supreme Court jurisdiction by virtue of the fact that purely local legal issues are involved, and are presently being litigated, Petitioners have attempted, albeit unsuccessfully in Respondents' view, to craft a constitutional argument. Thus, they would have this Court believe that in some way compliance by local municipal corporations with the laws of the state under whose statutes they were formed and are governed creates a federal constitutional issue appropriate for resolution by this Court. Faced with the logical and legal absurdity of that contention, Petitioners take another tack—that of castigating and personally attacking the respected justices of the Supreme Court of the State of Washington who, after twice comprehensively reviewing the issues raised, rendered a decision contrary to Petitioners' position. Petitioners' *ad hominem* attack on the members of the Washington Supreme Court who voted with the majority, mischaracterizing their opinions as manipulations of state law and totally unprincipled rulings, should be viewed by this Court as what it is—the plea of disappointed litigants. Understandable as those pleas may be, they do not form the basis for this Court's certiorari jurisdiction. The fact that a twice disappointed dissenting justice happens to share Petitioners' opinion does not change this inevitable result.

A reasoned decision by the highest court of one of the sovereign States which, as demonstrated below, examined all conceivable possibilities in an attempt to uphold Petitioners' trial court summary judgment, followed by Respondents' compliance with the state Supreme Court's judgment, does not constitute an unconstitutional abridgement of the rights of investors in tax-exempt municipal bonds. As a result, there is

no substantial federal issue within the jurisdiction of this Court.

STATEMENT OF THE CASE

For the first two-thirds of this century, the Pacific Northwest experienced a plentiful supply of electrical power due to the hydroelectric resources of the Columbia River and its tributaries. In the mid-1960's, however, regional energy planners began to foresee an increased need for electrical power that could not be satisfied by then existing resources. The vast majority of the region's public utilities depended wholly upon power purchased from the Bonneville Power Administration. Power forecasting reports from the Bonneville Power Administration and other concerned regional entities agreed that the hydroelectric resources of the Columbia River system, which had for decades provided ample power to the region's residential, farming, commercial and industrial users, would not be able to meet projected increases in power use during the 1980's and beyond. Faced with these projections, the Northwest's public utilities acknowledged their legal responsibility to provide needed electricity to the public and, along with all other major entities concerned with providing sufficient power to the region, began to plan for how to meet the then perceived needs.

Individual public utilities could not by themselves finance the huge costs associated with development of the large plants required by the region. This was particularly true of the development of nuclear plants, which were economically available only in large units that required significant initial capital investment well beyond that associated with earlier hydroelectric plants or coal-fired units. Large scale nuclear plants were being ordered by utilities in every region of the nation in the early 1970's. It was, therefore, determined that the Washington Public Power Supply System, a separate and distinct municipal corporation organized pursuant to the joint operat-

ing agency statutes of the State of Washington, could best serve as the focus for financing and constructing a series of nuclear projects anticipated to meet the projected electrical load growth for the region.

As a consequence, during the early 1970's, the Supply System entered into Net-Billing Agreements with these Respondents and other public utilities and the Bonneville Power Administration, whereby bonds were sold to finance construction of Washington Nuclear Projects 1, 2 and 3. The financing arrangement provided a billing credit from BPA to the participating utilities for amounts they contributed toward construction and other costs. This, in essence, provided a Bonneville Power Administration back-up for amounts necessary to retire the debt for these "net-billed" projects. In 1973, however, a United States Treasury Department ruling denied tax-exempt status for bonds to finance additional thermal projects if the projects were supported by BPA financing in the manner of the net-billed projects. Since regional forecasts projected substantial electrical load growth beyond that which would be provided by WNP 1, 2 and 3, there was a necessity to develop an alternative financing arrangement. What was eventually developed was the Participants' Agreement which is the subject of this litigation.

In early 1973, the Bonneville Power Administration told the utilities and industries that relied upon it for power that it would not be able to meet the energy needs of the region's consumers without construction of additional plants beyond the net-billed plants. To compound matters further, the energy crisis of the mid-1970's hit the Northwest in the same devastating manner it did most areas of the United States. Unlike other regions, the demand for electricity in the Northwest continued to grow after the OPEC oil embargo of 1973-74. Because of the oil embargo and related problems, the Washington legislature enacted legislation requiring public utilities in the State of Washington to develop energy curtailment plans, so that brown-outs or black-outs could be avoided. Penalties were provided for noncompliance with this statutory scheme.

As a result, there was ever-increasing pressure on the region's public utilities to finalize plans for development of needed thermal resources. In the midst of this energy-short climate, the Bonneville Power Administration issued a formal notice of insufficiency on June 24, 1976 stating that as of July 1, 1983, it would no longer be able to guarantee that it could meet the region's needs without the development of additional resources. The region's public utilities already had drafts of the Participants' Agreement for WNP 4 and 5 in their hands. Based upon the perceived need and the BPA notice of insufficiency, just a month later, when the Participants' Agreement was presented for final signature, the region's public utilities entered into what was then known as Phase 2 of the Hydro-Thermal Power Program.

Under the Participants' Agreement, 88 of the region's consumer-owned utilities agreed to assume payment obligations for WNP 4 and 5 by purchasing shares of project capability, irrespective of whether any power was ever produced by the plants. These Respondents believed they had legal authority to enter into such agreements by which they assumed the "dry-hole risk" and have never contended otherwise.

Unfortunately, delays and cost increases resulting from circumstances common to the United States nuclear construction industry occurred. As a result, the amounts needed to finance the projects grew larger and larger and became more and more expensive to raise, despite various financing alternatives explored. In addition, as the 1970's moved into the 1980's, it became clear that electric-load growth had been overestimated throughout the nation. The need for WNP 4 and 5 was many years further away than had previously been anticipated. The temporary result was a construction slowdown or "mothballing" of Projects 4 and 5, a status no different from dozens of other nuclear plants throughout the nation.

To assist the Supply System through the mothballing period, so that the projects' assets could be preserved for the time when construction would recommence and so nuclear licenses

would not be put at risk, these Respondents loaned millions of dollars to the Supply System. Unfortunately, projected costs continued to increase, and the need for the power did not develop. On January 22, 1982, the Supply System terminated construction on WNP 4 and 5.

Under the terms of the Participants' Agreement, payments by participants to the Supply System were not to begin until one year after project termination. To assist the Supply System in preserving the projects' assets for later use or sale and to keep the anticipated costs of terminating the projects in an orderly fashion as low as possible, these Respondents again loaned millions of dollars to the Supply System to assist it in keeping the projects afloat during the one-year hiatus.

Thereafter, in May, 1982, Chemical Bank, the WNP 4 and 5 bond fund trustee, commenced litigation in the Superior Court for King County, Washington, in Seattle, requesting a declaration that the Participants' Agreement was valid and binding and required a mandatory repayment obligation on behalf of the 88 participants. Chemical Bank filed a motion for summary judgment, joined in by the Supply System, by which it asserted that judgment should be rendered as a matter of law, as there were no contested questions of fact. The trial court ruled in Petitioners' favor. Pending the petition for review of that decision, many of these Respondents and other participants raised their electrical rates or otherwise made provision for financing the amounts due under the Participants' Agreement, and placed those funds in a court-approved escrow pending the decision of the Supreme Court of the State of Washington. A direct and expedited review by the Washington Supreme Court was sought so that the appellate process would not be delayed unnecessarily.

In June of 1983, the Washington Supreme Court issued its ruling that the Washington public utility districts and municipalities did not have statutory authority to enter into the Participants' Agreement. Petitioners' motion for reconsideration was denied. Thereafter, as the Supply System was unable

to raise any further funds through bond issues or other alternatives, it was forced to admit in writing its inability to pay its WNP 4 and 5 obligations as they became due. Chemical Bank then immediately declared an event of default and shortly thereafter accelerated the full amount due on the bonds.

In August, 1983, the trial court entered judgment on the basis of the Washington Supreme Court's June, 1983 decision. Chemical Bank and the Supply System then sought review of that Superior Court judgment alleging, among other things, denial of various constitutional provisions. On November 6, 1984, the Supreme Court of Washington issued its opinion rejecting Petitioners' contentions and affirming its earlier rulings. The Washington Supreme Court's mandate was issued on December 17, 1984.

REASONS FOR DENYING THE WRIT

Despite their persistent efforts, the simple truth is that Petitioners have failed to frame any viable federal constitutional issues. This Court has before it two reasoned and principled decisions of the highest court of the State of Washington. The decisions deal, in a comprehensive and orderly fashion, with a dispute involving exclusively principles of Washington state law. Petitioners have come forward with no justification for this Court to become involved in this litigation.

1. Petitioners Have Failed To Meet This Court's Stringent Standards For Review Of The Decisions Of The Highest Court Of A State.

Conspicuously absent from the Petition for Certiorari is any extended discussion whatsoever of this Court's time-honored and common sense reluctance to entangle itself in state court decisions concerning state law matters. This Court's standards for review of alleged constitutional violations differ dramatically when this Court is called upon to review the decision of the highest court of a state, as opposed to a lower federal court. Principles of federalism, comity, and abstention have come together to dictate that this Court show great deference and

give overwhelming weight to the highest court of a state's resolution of both factual and state law issues. For example, it is a fundamental precept that, except in extremely limited circumstances which are discussed *infra*, this Court must accept as conclusive the construction given to a state statute by the highest court of a state. Thus, in *Ex parte Converse*, 137 U.S. 624, 631 (1890), this Court stated as follows:

> It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error . . . . But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Mr. Justice Cardozo further developed and defined that line of authority in *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 362-65 (1932), when, on behalf of a unanimous Court, he held as follows:

> The inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's.
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> * * *
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts.

Even assuming, *arguendo*, that there was an error of state law by the Washington Supreme Court, this Court has strictly adhered to the view that an error of state law simply does not provide the basis for a legitimate claim of denial of due process or an unconstitutional taking.

> We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has

> been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 731, *reh'g denied*, 335 U.S. 837 (1948). Moreover, the Constitution simply does not guarantee that the decision of a state court shall be free from error, or require that decisions of a state court shall be consistent. *Patterson v. Colorado ex rel. Atty. Gen.*, 205 U.S. 454, 461 (1906). *See Stein v. New York*, 346 U.S. 156, 181 (1952); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937); *Roberts v. New York*, 295 U.S. 264, 277-78 (1934); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455-56 (1923).

The only extremely limited circumstance in which this Court has reviewed a state court decision on due process grounds is where the state court determination is totally arbitrary and unprincipled. *See, e.g., Hughes v. Washington*, 389 U.S. 290, 295-98 (1967); *Roberts v. New York*, *supra*, 295 U.S. at 277-78. As demonstrated below, this very narrow exception to the rule that this Court will not sit in judgment of state court determinations of exclusively state law issues is inapplicable to this litigation.

Petitioners have failed to come forward with a "substantial federal question" under this Court's standards for review of the decisions of the highest court of a state. Thus, this Court is without jurisdiction to proceed further in this litigation.

2. Petitioners Cannot Assert In Good Faith That The Decisions Of The Washington Supreme Court Were Unprincipled, Manipulative, and Unjustifiable.

Regardless of whether Petitioners focus upon an alleged unconstitutional taking or a due process violation, the underpinning of their alleged constitutional claim is that the decisions of the Supreme Court of Washington, one of the most highly regarded courts of last resort in the nation, were unprincipled, manipulative, and unjustifiable. It is, however, Peti-

tioners' attack on the Washington Supreme Court that is unjustifiable and unprincipled, not that Court's decision. Petitioners' mischaracterizations of the Washington Supreme Court's decision-making process in this litigation as a cursory rejection of Petitioners' positions are simply untrue. These opinions are not brief, summary rejections of Petitioners' positions. They are thorough and comprehensive evaluations of every conceivable Washington statutory law governing the purchase of thermal project capability by Washington public utility districts and cities. There is simply no credible basis for Petitioners' Takings Clause (U.S. Const. Amend. V, cl. 4) and Due Process Clause (U.S. Const. Amend. XIV, § 1, cl. 3) assertions.

It is fair to assume that, at least in part, Petitioners chose to describe the Washington Supreme Court's decisions in such derogatory terms in an attempt to dramatize this litigation and catch the eye of this Court. There is also, however, an extremely important legal reason why petitioners have attempted to cast those decisions as unprecedented and unforeseeable. As Petitioners themselves have now conceded, a judicial decision cannot provide the stuff of which a Constitutional impairment of contract issue can be raised under Article I, § 10, cl. 1 of the Constitution. Petition at 22. *See, e.g., Tidal Oil v. Flanagan, supra*, 263 U.S. at 451-54. Faced with that reality, Petitioners were forced to base their Petition on the Takings Clause and the Due Process Clause.

Petitioners claim the Washington Supreme Court's decision was so unexpected, unprincipled, and unjustifiable as to be totally arbitrary and thus constitute a taking or a due process violation. Petitioners' own "catch-word" for the Washington Supreme Court's decisions is "unforeseeable." One of the most eloquent refutations of that mischaracterization is provided by Petitioner Chemical Bank's own stance in the proceedings which have taken place in the presently pending federal securities litigation.

At a time when it suited Chemical Bank's purposes to do so—and, more importantly, at a time when Chemical Bank's counsel were under an explicit, affirmative duty pursuant to Rule 11, F.R. Civ. P., to make only those allegations which are "well grounded in fact and . . . warranted by existing law or a good faith argument"—Chemical Bank contended and is at this very moment contending that the decisions of the Washington Supreme Court were anything but "unforeseeable." In Chemical Bank's Second Amended Complaint, which was filed in the federal securities litigation on December 28, 1983, the Bank alleges that some 44 directors of the Supply System, the 88 participants in WNP 4 and 5, the 32 individuals and entities which served on the Participants' Committee, and—most significantly—the Supply System itself (Chemical Bank's co-petitioner before this Court) knew, or were reckless in failing to determine (judged by a scienter standard) as of at least 1976 that the representations in the WNP 4 and 5 official statements concerning the authority of the participants to execute the Participants' Agreement were false. *See* Chemical Bank's Second Amended Complaint at 41-45, 54-55, 57, 62, 68, 72-73, and 76. Those particular allegations, along with others, were the subject of a Rule 11 motion before the United States District Court for the Western District of Washington. After full briefing and oral argument, that Rule 11 motion was denied, thus confirming, at least at this stage of the proceedings, that Chemical Bank and its counsel had a good faith belief in the truth and veracity of their allegations concerning authority.

The import of those allegations, of course, is nothing other than a clear and precise contradiction of the position which Petitioners would now have this Court take. If, as Chemical Bank contends, in or about 1976, well in excess of 150 individuals and entities knew "or should have known" that, if challenged, the Participants' Agreement would one day be declared null and void by the Washington Supreme Court, then how is it in a petition for certiorari filed in February, 1985 those same Washington Supreme Court decisions are suddenly "unprecedented, unforeseeable and unjustifiable"? The answer, of

course, is that Chemical Bank's position before this Court is nothing more than one it has assumed in order to attempt to overcome this Court's stringent standards for the review of a state court decision. Furthermore, contrary to Petitioners' attempt to leave the impression that they are without any judicial avenue of relief, the Bank and bond purchasers continue to pursue massive litigation in the federal and state courts alleging fraud and misrepresentation as a result of the very opinion they argue came as a surprise.

This transparent attempt to substitute words for substance is underscored by the fact that the Supply System, Chemical Bank's co-petitioner before this Court, joined before this Court in the Bank's characterization of the Washington Supreme Court's decisions. How then can it be that in its federal securities action Chemical Bank alleges that the Supply System itself knew or should have known that, if challenged, the Participants' Agreement would fall?[3]

Pleading in the alternative is one thing, and it is a commonly accepted and entirely appropriate legal procedure. However,

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[3]When the bond purchasers' allegations in the federal securities class action are considered, the contrived nature of the present position of Chemical Bank—their bond fund trustee—becomes even more apparent. In the bond purchasers' Second Amended Complaint, they also allege that all participants, all Supply System directors, all Participants' Committee members, and the Supply System knew or should have known prior to July, 1976 that the participants

> lacked the requisite authority to enter into their Participants' Agreement. It is reasonable to infer that at the time the Participants' Agreements were executed these Participants were either aware of serious questions regarding their authority, or recklessly disregarded them because the language of the Agreements, the relevant facts and the law governing their authority did not change adverse to a finding of authority from the time they entered into the agreements through the end of the Class Period.

Second Amended Complaint at § 114. *See id.* at 78-79, 83, 85, 108-112, 113, 115-18. Those allegations leave no room for Petitioners' contention before this Court that the Washington Supreme Court's decisions were completely "unforeseeable."

championing one position in front of this Court in an attempt to characterize a state Supreme Court decision as "unforeseeable" when Petitioner asserts a contrary position before the United States District Court for the Western District of Washington, and purporting to do so in good faith, reveals the inherent weakness in Petitioners' position and the lengths to which they are obviously willing to go in order to persuade this Court to become involved in those decisions. Words cannot hide the lack of a federal question; they cry out for the immediate denial of the Petition for Certiorari.

3. Petitioners Have Not Met Their Burden Of Demonstrating That There Is A Substantial Federal Question Concerning An Alleged Unconstitutional "Taking.

Throughout the Petition for Certiorari, Petitioners have, on a superficial level, made all the proper arguments and invoked all the phrases and concepts which might, in an appropriate case, provide this Court with jurisdiction over a state court decision. When Petitioners' form is discarded and substance is scrutinized, however, it readily becomes apparent that their arguments are groundless. Nowhere is this more true than in Petitioners' arguments concerning an alleged unconstitutional taking.

Petitioners' Takings Clause assertions, in fact, fail at the very outset, as no "taking" occurred. Given the conclusion of the Washington Supreme Court on this precise issue and the deference which this Court has traditionally accorded rulings of this kind by the highest court of a state, this Court need not labor long over Petitioners' takings claims.

In the context of discussing the concepts of restitution and unjust enrichment, the Washington Supreme Court, dealing with an area of the law which is exclusively state-oriented in nature, discussed in detail whether any benefit flowed from the bondholders to Respondents before this Court. In *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 909-11, 691 P.2d 524, 544-45 (1984), the Washington Su-

preme Court definitively determined that Respondents received nothing from the bondholders.

> The definition of benefit is critical to appellants' argument because respondents allege that the bondholders did not confer a benefit on the participants.
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> * * *
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> As noted above, the Restatement's definition of benefit is quite broad. Thus, our task here is to determine whether any asserted benefits fall within this definition. We conclude they do not.
>
> We find persuasive respondents' theory that the benefits of the bond revenues flowed to WPPSS and no further. WPPSS contracted with the bondholders, received their money and appropriated it for its purposes. We can see no benefit to the participants in these circumstances.

The issue of whether or not Respondents received anything from the bondholders in any manner or fashion whatsoever was exhaustively briefed and argued before the Washington Supreme Court. Petitioners were given every conceivable opportunity to sway the Washington Supreme Court to their position, but it was soundly rejected by a reasoned and principled holding of that Court.

> It should be added that, however strong the argument for a different interpretation, the one adopted also was strongly supported, so that there can be no pretense that a perverse reading of the law was used as an excuse for [the ruling below by the highest court of a state]. The decision was absolutely entitled to respect.

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26 (1916).

Because there was absolutely no *taking* in fact of anything by Respondents, Petitioners' "taking" argument fails at the very threshold stage. Petitioners' nevertheless purport to state a substantial issue under the Federal Constitution because the

Washington State Supreme Court determined that the 28 Washington municipal entities were not able to make restitution because those entities' official acts in connection with the Participants' Agreement were "substantively ultra vires". *Chemical Bank v. WPPSS*, *supra*, 102 Wn.2d at 911-12, 691 P.2d at 544-45.

The Washington Supreme Court's decision on this matter is firmly rooted in well over 80 years of internally consistent Washington Supreme Court decisions. It most recently considered the conditions under which a plaintiff can recover against a governmental entity which acted beyond the scope of its substantive authority in *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982). In that decision, the Washington Supreme Court stated as follows:

> While the ultra vires doctrine prevents a governmental agency from favoring a private entity at the expense of the public interest, it does not leave the unsuspecting private party entirely at the mercy of governmental misfeasance. Under certain conditions, a private party acting in good faith is entitled to some recovery. *First, the agency must have had the power it sought to exercise but merely have exercised it in an irregular manner or by unauthorized procedural means.*[3] *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968). Second, the action must not be malum in se, malum prohibitum, or manifestly against public policy. Finch, at 175; *Edwards v. Renton*, [67 Wn.2d 598, 604 (1965)]. If these two conditions are satisfied, a private party acting in good faith may recover to the extent necessary to prevent "manifest injustice" or unjust enrichment.

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[3]The distinction between procedural irregularity and a substantive lack of authority is justified by the fact that in the latter case, the agency lacks the power to do the act in *any* manner. Where authority is so completely lacking it seems fair to presume bad faith on the part of the private party.

98 Wn.2d at 381, 655 P.2d at 250 (emphasis in text, not footnote, added).

Noel v. Cole, supra, 98 Wn.2d 375, 655 P.2d 245, was only the most recent case in which the Washington Supreme Court set forth the standards which govern the determination of rights, if any, in connection with a Washington municipality's *ultra vires* contracts. Virtually since statehood the Washington Supreme Court has steadfastly maintained that where a municipality lacks *substantive* authority to enter into a contract, the contract is absolutely null and void, and there can be no recovery *on any theory* against the municipality. That concept can come as no "surprise" to petitioners, or to anyone else. *See, e.g., Osborne, Tremper & Co. v. King County*, 76 Wash. 277, 185-86, 136 P. 138, 141 (1913); *State ex rel. Craig v. Newport*, 70 Wash. 286, 292-94, 126 P. 637, 640 (1912); *accord*, 10 E. McQuillin, *The Law of Municipal Corporations* § 29.10 at 2.37 (3d ed. 1981). In *Chehalis County v. Hutcheson*, 21 Wash. 82, 85, 57 P. 341, 342 (1899), the Court (quoting from 2 *Herman on Estoppel* at 1363) offered a concise, yet enduring, summary of the principles underlying the law of Washington State with regard to *ultra vires* contracts of municipalities:

> The true principle in such cases is well settled that one cannot do indirectly, what cannot be done directly, and, where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. Where there is power, and it is irregularly exercised, or there are defects and omissions in exercising the authority conferred by law, the doctrine of equitable estoppel may well be applied by courts.

With this extensive body of *ultra vires* decisions as a backdrop, and after a comprehensive review of the Participants' Agreement and all possible statutory sources of authority for the Washington municipalities' execution of that Agreement, in this litigation the Washington Supreme Court explicitly held that the Washington municipalities lacked *substantive* authority to execute the Participants' Agreement. *Chemical*

Bank v. Washington Public Power Supply System, 99 Wn.2d 772, 798, 666 P.2d 329, 342 (1983). It affirmed this holding in its November, 1984 decision. 102 Wn.2d at 910-11, 691 P.2d at 544-45. This Court has been given no legitimate reason why it should interfere with that ruling on a matter of exclusively state law.

Petitioners also contend that the rulings of the Washington Supreme Court somehow expressly conflict with this Court's determination in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155 (1980). That decision involved a straightforward situation[4] in which a county, acting pursuant to a statute of the state of Florida, took as its own the interest which accrued on an interpleader fund deposited in the registry of the county court. This Court held that because no police power justification had even been offered for the deprivation or taking, and because neither the statute nor respondents in *Webb's* offered any reasonable basis whatsoever in order to sustain the taking of the interest earned by the interpleader fund, an unconstitutional taking had occurred. *Id.* at 163-64. Significantly, this Court went to great pains to emphasize that its ruling in *Webb's* was an extremely limited one.

> We hold that under the narrow circumstances of this case—where there is a separate and distinct state statute authorizing a clerk's fee 'for services rendered' based upon the amount of a principal deposited; where the deposited fund itself concededly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others—Seminole County's taking unto itself, under [the authority of a specific state statute], the interest earned on the interpleader fund while it was

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[4]The Court expressly recited in its opinion that it had taken jurisdiction of the case "[b]ecause it had been held elsewhere that a county's appropriation of the interest earned on private funds deposited in court in an interpleader action is an unconstitutional taking [citations omitted]." Id. at 159.

> in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments.

Webb's Fabulous Pharmacies, supra, 449 U.S. at 164.

To recite the facts and holding of *Webb's* is sufficient to demonstrate that it has little, if any, relevance to the issues now before this Court. Not only *Webb's*, but also each of the other "takings" decisions of this Court relied upon by Petitioners, deals expressly with situations in which governmental actions were found to involve unconstitutional takings as a result of express legislative or regulatory action. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Armstrong v. United States*, 364 U.S. 40 (1960). No such confiscatory legislative or regulatory activity played any part in the litigation now before this Court. Rather, this Court is faced with a situation in which the Washington State Supreme Court, in two painstakingly detailed and lengthy opinions, determined the limits of the substantive authority of the Washington municipalities. Those decisions are entitled to, and clearly should be accorded, finality and conclusiveness by this Court.

Petitioners further claim that the Washington Supreme Court violated their property rights through an alleged invocation of an unavailable declaratory judgment remedy. *See* Petitioners' Brief at 18. Petitioners make the same assertions in their claims regarding violations of the Due Process Clause. *See* Petitioner's Brief at 26-27.

The underlying basis for Petitioners' claim is the Washington Supreme Court's alleged denial of equitable relief which Petitioners claim was based wholly upon the Court's observation regarding an earlier opportunity to litigate the matters at issue. On the face of the Court's opinion itself, however, it is clear that the Court based its denial of all equitable remedies with regard to Washington municipalities firmly on a totally independent ground: the conclusion that entering into the Par-

ticipants' Agreement on the part of the Washington municipalities was substantively *ultra vires*. The Court explicitly stated that, although its discussion of the procedural versus substantive dichotomy was contained in the section of its opinion concerning restitution or unjust enrichment, its conclusion that the acts complained of were substantively *ultra vires* and, therefore, void in all respects, precluded any equitable relief sought, be it restitution, estoppel, or otherwise. *Chemical Bank v. WPPSS, supra*, 102 Wn.2d at 910, 691 P.2d at 544-45, fn. 10.

The fact that the Court articulated an additional basis for its ruling, even if that basis was erroneous as Petitioners contend, is at best harmless error. In ruling on a Writ of Certiorari, this Court must evaluate Petitioners' claims "without regard to errors or defects which do not affect the substantial rights of the parties", as they are harmless error. 28 U.S.C. § 2111. So long as a proper result is reached pursuant to established legal principles, the fact that an additional allegedly incorrect reason was given is simply not germane. Even if a lower court decision is erroneous, it must be affirmed if the record reveals another ground which supports the decision. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

This "red herring" certainly cannot raise a federal constitutional issue appropriate for review by this Court. The Court's mention of a possible bondholder declaratory judgment action was, in essence, mere *dictum* under the circumstances.[5] Even if the Washington Supreme Court had never alluded to a possible declaratory remedy, there was no basis under Washington law for recovery on any equitable theory against the Washington public utility districts and cities. As a result, Peti-

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[5]Even Justice Utter must have felt this was the case, since, despite his lengthy and vigorous dissent which attempted to articulate his opinion regarding every possible basis for reversal of the majority opinion, he never identified this issue as error appropriate for review by this Court. He apparently recognized that the majority intended this reference only as *dictum*.

tioners' claim that the Washington Supreme Court's mentioning an additional possible basis for its denial of equitable relief creates substantial federal constitutional issues under the Takings Clause and the Due Process Clause should be rejected.

Faced with the insurmountable obstacles to establishing a case based upon the Takings Clause discussed above, Petitioners attempt to fashion a "takings" argument based upon conduct of Washington public utility districts and cities which they totally mischaracterize as "repudiation" of their WNP 4 and 5 obligations. But their only real complaint is with the decision of the Washington Supreme Court. Moreover, as indicated in the Statement of the Case, *supra*, these Respondents never have attempted to "repudiate" their obligation to make payments for WNP 4 and 5. Indeed, all evidence in the record in this litigation and in multiple depositions to date in the federal securities litigation undeniably demonstrates that these Respondents always intended to honor their obligations until the Washington Supreme Court told them they did not have legal statutory authority to do so.

These Respondents always acted under the assumption that they had the "dry-hole" risk for WNP 4 and 5, and they took steps to honor that obligation if necessary. They loaned substantial sums to the Supply System to assist it through the mothball and termination phases, and they raised rates and paid amounts due into escrow pending the Washington Supreme Court's decision.[6] Furthermore, after the Supreme Court's June, 1983 decision, it would have been illegal for Respondents to have made payments pursuant to the Participants' Agreement. Inflammatory and misleading rhetoric can-

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[6]Indeed, in early 1983 these Respondents spent hundreds of thousands of dollars to develop a refinancing plan, which, by means of payments from these Respondents and others, would have enabled WNP 4 and 5 bondholders to be paid one hundred cents on the dollar. This "Debt Reduction Plan," however, did not succeed due to lack of support from the Bonneville Power Administration and the investor-owned utilities.

not transform Petitioners' allegations into a taking or other constitutional impairment of property rights.[7]

4. Petitioners' Due Process Allegations are Unfounded.

Even after having argued their positions to the Washington Supreme Court twice and having engaged in voluminous briefing and oral argument, Petitioners yet continue to assert that they have never had their day in court and that their due process rights have thereby been denied. Petitioners' principal focus concerning procedural due process is on the statutory authority determination by the Washington Supreme Court, including the question of ownership or control by WNP 4 and 5 participating utilities. Examination of the Court's opinions belies Petitioners' assertions that the Court disregarded critical issues and did not provide a constitutionally satisfactory opportunity for Petitioners to be heard. Indeed, in both opinions, the Washington Supreme Court took care to consider every conceivable statutory authority provision which might support Petitioners' position. It examined numerous Washington statutes, including those related to authority to purchase electricity, authority to enter into joint operating agreements, and authority to acquire or construct electric generating facilities, and it reviewed in depth both express and implied statutory powers.[8]

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[7]Various briefs submitted by movants for *amicus curiae* status also address the Takings Clause issue. Those briefs, however, add nothing to Petitioners' argument. Furthermore, the partisan stance taken by the Underwriters and the City of Seattle renders questionable their status as *amicus curiae*. The role of *amicus curiae* is advisory rather than adversary. Although their advocacy stance is understandable as they are defendants in a multi-billion dollar lawsuit as a result of their involvement in WNP 4 and 5, their asserted position as *amicus curiae* may be improper. It is also interesting to note that Petitioner, Chemical Bank, did not name as defendants in its federal court action the Underwriters or any of the other East Coast financial corporations named as defendants by the class plaintiffs.

[8]Indeed, in both Washington Supreme Court decisions, Justice Utter and those who joined him in dissent vigorously asserted their position. Presumably, there was extensive conferencing among the justices with the dissenters unsuccessfully attempting to convince the majority that the latter was in error.

One of Petitioners' own principal examples of the Washington Supreme Court's alleged manipulation of state law, in fact, clearly demonstrates that the Court gave every benefit of the doubt to Petitioners in its consideration of proper statutory authority. Thus, in its discussion of possible authority under statutes relating to the acquisition of electric generating facilities, the Court in its June, 1983 decision at page 785 noted that in its previous decisions construing those statutes, it had "never found authority for a project in which the participants did not have an ownership interest," citing several of its own decisions. The Court, however, went on as follows:

> Nonetheless, *rather than ruling that an ownership interest is an absolute requirement when acquiring or constructing generating facilities*, we will examine the present agreement to determine whether the Participants retained sufficient control over the project to constitute the equivalent of an ownership interest.

Chemical Bank v. WPPSS, *supra*, 99 Wn.2d at 787, 666 P.2d at 337 (emphasis added). The Court incorporated this approach in its second decision as well. *Chemical Bank v. WPPSS*, *supra*, 102 Wn.2d at 892-94, 691 P.2d at 535-36.

Petitioners' assertion throughout their Petition that the Washington Supreme Court denied due process by "ruling for the first time that the authority of the municipalities turned on whether they exercised 'sufficient control' over the management of the projects . . ." is a total mischaracterization of the Court's opinion and Washington law. As demonstrated above, the Court recognized that its precedents required the existence of an ownership interest under the statutes related to acquisition of electrical generating facilities. However, it considered authority underpinnings that went beyond the ownership requirement. It attempted, on behalf of Petitioners, to find that some sort of "control" under the terms of the Participants' Agreement sufficient to constitute the equivalent of ownership under the Washington statutes was present. The Court's finding as a matter of law that no such control existed,

when the Court was by no means required by its earlier decisions to consider anything short of actual ownership, can by no stretch of the imagination constitute a violation of the Due Process or Takings Clauses.

Petitioners also attempt to characterize the Court's decisions as manipulative and violative of the Due Process Clause by asserting that the Court made findings as to the control issue on the basis of a disputed record. But it was Chemical Bank, joined in by the Supply System, which moved for summary judgment in the trial court proceedings. Despite various factual matters Petitioners now assert were present in the trial court record, their motion for summary judgment took the position that the authority issue and all other issues could be resolved as matters of law[9]. Because Petitioners themselves acknowledged that there were no genuine issues of material fact, they can not credibly argue at this point that any decisions, either at the trial or appellate level, were improperly based upon a disputed factual record.

One of Petitioners' principal assertions in this regard is that the Court disregarded the fact that certain participants were also members of the Supply System. Contrary to Petitioners' claims, however, the Court did not purposely overlook the relevance, if any, of the fact that some participants were Supply System members. Petitioners mistakenly assume that the fact that a participant was also a member of the Supply System is in some way relevant to determining whether participants in WNP 4 and 5 retained sufficient ownership control under the terms of the Participants' Agreement to permit a finding of statutory authority. The Court considered that position at least

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[9]This is, of course, consistent with the Washington Supreme Court's conclusion regarding ownership control that "the participants' agreement . . . create[s] the contractual rights of the parties [and] [i]nterpretation of those agreements is a question of law." *Chemical Bank v. WPPSS, et al., supra*, 102 Wn.2d, at 894, 691 P.2d at 536, citing *Kelly v. Aetna Casualty & Surety Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983).

twice[10] and properly rejected it. The Court correctly focused its attention on what elements of control, if any, were provided under the terms of the Participants' Agreement to participants in their role as participants, because it is that role, and that alone, which is relevant to the issue of whether a participant had statutory authority to sign the Participants' Agreement in 1976.

> [W]e do not believe the participants retained sufficient ownership interests or management responsibilities *under this agreement* to constitute acquisition or construction of an electric generating facility.

Chemical Bank v. WPPSS, *supra*, 99 Wn.2d at 791, 666 P.2d at 339 (emphasis added). *See also id.*, 99 Wn.2d at 798-99, 666 P.2d at 342-43. In the second *Chemical Bank* appeal, the Court's painstaking analysis of the Participants' Agreement, addressing its contrast with the rights afforded to one of the investor-owned utilities under its WNP 5 Ownership Agreement with the Supply System, 102 Wn.2d at 892-94, 691 P.2d at 535-36, clearly demonstrates that the Court focused properly upon the terms of the Agreement in evaluating the rights of participants at the time the agreement was signed.

Reduced to basic principles of contract law, the Participants' Agreement involved two contracting parties: the Supply System on one side and participants on the other. The Court properly determined that for the purpose of evaluating statutory authority by virtue of ownership control by a participant who signed the Participants' Agreement in 1976, utilities were not properly viewed as members versus non-members, or as electricity generators versus non-generators, or whatever, but as participants in the projects in question. The Supply System and its member utilities are separate and distinct municipal corporations formed at different times pursuant to Washington law. RCW 43.52.360. Thus, the fact that a participant also might have served in some other role is irrelevant to deciding

[10]The issue of control by virtue of Supply System membership was addressed in both decisions of the Court, as well as in Petitioners' unsuccessful motion for reconsideration after the June, 1983 decision.

whether that participant, as a separate municipal entity contracting with the Supply System for a share of project capability, retained sufficient indicia of ownership under the Participants' Agreement to satisfy the requirements of statutory authority under Washington law.

Furthermore, the Participants' Agreement, and Bond Resolution 890 to which it relates, plainly contemplates that whatever control, if any, might potentially be exercised by the non-Supply System contracting party was to be through the Participants' Committee under the terms of the Agreement. That committee was established under the terms of the Agreement to vote the shares of all 88 participating utilities. In addition, as not all of the Supply System members were participants in WNP 4 and 5, it is clear that the two different capacities were not intended to be viewed as one for the purpose of determining whether in 1976 a contracting party had legal authority to do so. Indeed, some participants did not even become members of the Supply System until after the Participants' Agreement was signed. Since it is a utility's authority at the time the contract was signed which is critical, it is clear that the focus must be on an individual participant's authority as a participant, regardless of any other status or characteristics it might possess.

As to alleged control by virtue of the Participants' Committee, in addition to what has previously been demonstrated in this Brief, suffice it to say that after exhaustive analysis of the terms of the Agreement, the Washington Supreme Court concluded that whatever ostensible indicia of control by participants might have existed under the Agreement were not sufficient to make such control the equivalent of ownership consistent with the Court's previous rulings. The Court properly focused upon the four corners of the Agreement itself and rendered its decision.[11]

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[11]To the extent that Petitioners' excerpts from oral argument and depositions in the MDL-551 federal court action are even supportive of Petitioners' position, which these Respondents contend they are not, the excerpts are not

Finally, Petitioners contend that their due process rights were denied because certain justices declined to disqualify themselves when this case came before the Washington Supreme Court for a second time. Chemical Bank's attack[12] upon these jurists and the deliberative processes of the Court has no merit whatsoever; in addition, the manner in which the Bank chose to raise this issue is woefully deficient and inappropriate as a matter of State law.

Chemical Bank's argument apparently is that if either of the Justices it challenged were customers of one of the municipalities or public utility districts which were found by the Court to be without authority to execute the Participants' Agreement, then those jurists had such a significant financial stake in this litigation that they should not have proceeded to participate in the Court's earlier deliberations.[13] That position is entirely without merit.

The Bank's argument, of course, would mean that no court could ever hear, for example, a case in which an issue of tax law is concerned. If the court hearing such a matter were to strike down the tax in question and thus reduce the tax burden on all affected citizens—including the judge who made the decision—

---

germane to the question at issue. The Washington Supreme Court made it clear that its focus (and properly so) was upon the Participants' Agreement itself to determine whether, at the time Respondents signed the Agreement, they retained sufficient management control under its terms to satisfy the equivalent of ownership for the purpose of determining their authority to enter into the Agreement. Opinions of counsel or other parties cannot substitute for the language of the contract which established the parameters of the Participants' Committee's role at the time of the Agreement's execution.

[12]The Supply System did not join in this attack when it was first raised, and it apparently does not endorse Chemical Bank's argument on this point at this stage. See Petition at 27.

[13]It is interesting to note that Chemical Bank has not brought to this Court's attention the fact that Justice Utter, who authored both dissenting opinions, also owns propery served by one of the WNP 4 and 5 participants, despite the fact that the Bank was informed of that fact by the Clerk of the Washington Supreme Court by letter dated January 17, 1984.

the deciding court would indirectly benefit financially from that decision. Nevertheless, the law is replete with decisions in which precisely those types of decisions have been properly rendered by courts. For example, in *Nueces County Drainage & Conservation District No. 2 v. Bevly*, 519 S.W.2d 938, 951-52 (Tex. 1975), the Court held as follows:

> The interest of a judge, in order that he would be disqualified, must, in general, be a direct pecuniary or property interest in the subject matter of the litigation . . . . Where a judge's pecuniary interest is not specially affected, a judge is not by reason of being a taxpayer disqualified from sitting in a case . . . . If it were otherwise, it would be difficult, if not impossible, to get cases tried.

This case fits squarely within the law as pronounced in *Bevly, supra*. *See New Orleans Public Services v. United Gas Pipe Line*, 719 F.2d 733, 735 (5th Cir. 1983) ("Where the utility is a party, the ratepaying status of a judge is not disqualifying."). Unlike the cases relied upon by Chemical Bank, this is not a situation where, for example, any Justice of the Washington Supreme Court '"occupies two practically and seriously inconsistent positions, one partisan and the other judicial . . . ."' *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), quoting from *Tumey v. Ohio*, 273 U.S. 510, 534 (1927).[14]

Chemical Bank's untimely, unfounded accusations of bias should be rejected.

---

[14]Even if it were to be assumed for the sake of argument that Chemical Bank's charges were in any way legitimate, however, this Court should carefully note that conspicuously absent from the Petition (as well as from all briefs filed before the Washington Supreme Court) is any memtion, much less any explanation, of why Chemical Bank elected not to level these charges at any of the many times that the Court was considering this case prior to its June 15, 1983 opinion. In addition, Chemical Bank has elected not to bring to the attention of this Court (or to the Washington Supreme Court) the numerous decisions by the Courts of Washington State which have considered and rejected untimely challenges very similar to that in which the Bank is now engaged. *See, e.g., Brauhn v. Brauhn*, 10 Wn.App. 592, 597, 518 P.2d 1089, 1092 (1974).

CONCLUSION

Petitioners and *amici curiae* have attempted to raise every conceivable red flag and catch-phrase, and to enlist every possible means to add authenticity to their assertions of violations of the United States Constitution. No amount of verbiage, however, can change the fact that they have failed to frame any federal constitutional issues which would give rise to this Court's certiorari jurisdiction. For all of the reasons set forth above, the Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED this ____ day of March, 1985.

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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The American Association of Retired Persons ("AARP") respectfully moves pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file the brief annexed hereto as *amicus curiae* supporting the petition for a writ of certiorari.

AARP, of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity

and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the investing public.

In support of its motion AARP states:

1. While the petitioners have consented to the filing of the brief, AARP has been unable to obtain the consent of all of the respondents.

2. The decision of the Supreme Court of the State of Washington upholding the participants' renunciation of their obligations raises questions of broad importance to the security of investments in the national municipal bond market.

3. As explained more fully in the attached brief, that decision, if allowed to stand, will cause serious hardship to thousands of older Americans who invested in the bonds at issue, often in a unique manner because of their age, and will substantially and adversely affect the interests of other older Americans throughout this country who depend on the security of the national municipal bond market to provide for their retirement. For those reasons, AARP, on behalf of its 18 million members and all older Americans, has a vital and continuing interest in a review by this Court of the questions presented by the petition.

Dated: New York, New York
March 4, 1985

Respectfully submitted,

MILLER, SINGER & RAIVES, P.C.

By: /s/ ALFRED MILLER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for

older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the investing public.

There is no practicable way for AARP to know exactly how many of the estimated 45,000 holders of Washington Public Power Supply System ("WPPSS") 4 and 5 bonds are older persons. It is apparent, however, that a significant number of holders of those bonds are older persons who are members or are entitled to be members of the Association.[1] The Association has received many letters (and has been made aware of many others) from older persons setting forth their reliance as bondholders upon the contractual obligations of the participating municipalities and pointing out the hardships that the unprecedented decision of the Washington Supreme Court has created for them. These letters show that the adverse impact of the actions by the respondents has fallen heavily on older persons, in large part because of their age.[2]

---

[1] For example, the Association has been advised that Chemical Bank estimates that there are 8,000 bondholders in Florida. Since Florida has the highest percentage of persons 65 or older in the United States (17.4% of population in 1982, *see* Bureau of Census, Statistical Abstract of the United States 34 (1984)), and families headed by persons over 65 are more likely to own municipal securities than are families headed by younger persons, *see* Fed. Res. Bull. 687 (1984), it is reasonable to infer that a significant percentage of those bondholders are older Americans.

[2] Examples of such letters are as follows (all spelling as in originals):

"I have 2 $5,000.00 bonds in WPPSS 4 & 5. I just like you to know I live on a very small Pension & that $100.00 a month in divideens ment I could have food when I wanted to buy. But now I'll have to think twice after Jan. 1st no dividen. Its a terrible thing they have done to a lot of poor widows, like me."

* * *

"We are very concerned with W.P.P.S.S. # 4 & 5 Projects as we have nearly all our retirement funds there. We have nothing beside S.S. to live on in

The participants' repudiation of their obligations, and the decision by the Washington Supreme Court allowing that repudiation without remedy, have imposed an unwarranted economic burden on these and thousands of other retired bondholders. It is on behalf of the many older persons who are holders of these bonds, among others, that AARP urges this Court to grant certiorari in this critically important case.

SUMMARY OF ARGUMENT

AARP urges this Court to review the decision of the Supreme Court of the State of Washington and to rectify the grave injustice that has been done to a substantial number of bondholders who are older Americans. As the largest organized

---

(footnote con'd)
retirement and our loaning to W.P.P.S.S. and the participating utilities was done in good faith and believing they would repay said loan."

* * *

"I am a senior citizen, a widow, and will feel the loss of this income. It is not fair that the citizens of the state of Washington should get cheap utility rates at the expense of others. If their rates were raised and they paid off their honest debts then I too could pay my utility bill and keep my home nice and cozy; instead, I must use cardboard screens to keep warm & be able to pay the rate [my local utility] finds necessary to charge in order to pay off its bonded indebtedness."

* * *

"This is a very difficult loss for me. I am nearing retirement age and with the social security system being strapped so badly and cuts predicted, I felt I would have to rely more upon my own resources in the future."

* * *

"I am a widow (84 years old in August 1984) and have a very tight Interest Income which has never been enough to take care of my expenses. I was assured when I bought this Bond that I will be paid regular Interest on it. Without the Interest from this Bond it will make my Life much harder yet....I assure you this is more important to me than to somebody who has plenty to live on."

* * *

"Now I am the holder of these defaulted WPPSS bonds for almost all my life's savings -- and at this stage of my life, I can look ahead only to a very dim and precarious future."

group of older Americans in the country, AARP has become keenly aware of the disproportionate impact upon older persons of the state court's decision. This perspective clarifies the reasons why the participants' renunciation of their obligations was a taking which requires compensation.

Plainly, the economic impact of the participants' renunciation is harshest where it falls on individuals who had invested their life's savings in WPPSS bonds. Unless the decision below is reversed, these bondholders will have had their investments wiped out entirely — a result which will be catastrophic for them.

Moreover, the many older persons who own other municipal bonds will have reason to fear that other municipalities to which they loaned their savings might also be able to avoid their debts. Yet the need to rely upon the purported security of their investments and avoid risk is greater on the part of older Americans who invest their savings in municipal bonds than for younger persons. Older citizens rely particularly heavily on assurances regarding the safety of their investments such as the ones that were advanced here by the participants and confirmed by independent counsel.

Insofar as any analysis of the Takings Clause[3] accounts for the ability of the injured parties to protect their interests or to receive countervailing benefits through the political process, this Court should recognize that older victims of the WPPSS default have nowhere else to turn for protection against the municipal confiscation permitted by the decision of the court below. Most of the bonds were sold outside of Washington State to non-Washington residents. The loss suffered by the out-of-state bondholders will not be offset by any share in benefits associated with the pursuit by Washington municipalities of the local interests of their own residents and taxpapers.

ARGUMENT

AARP seeks here to highlight the reasons why the impact of the

[3] U.S. Const. amend. V, cl...4.

Washington court's decision on older persons makes this case particularly deserving of review by this Court.

The Takings Clause was designed to prevent governmental action that would require "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *See also, Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). The policies underlying the Clause, and the need for this Court to act to vindicate its purposes, are at their height when the people who are adversely affected by governmental overreaching are those, such as older persons, who are the least able to protect themselves and who, in consequence, suffer greater losses, can hope for fewer countervailing benefits, and have less ability than others to defend themselves effectively against majoritarian abuse.

In deciding whether the Takings Clause should afford protection under particular circumstances, this Court has identified several factors that determine whether compensation must be paid for losses imposed on individuals for the purported benefit of the public. The key factors are (1) the economic impact of the governmental action, (2) the extent to which the action interferes with reasonable, investment backed expectations, and (3) whether the governmental action is merely part of a regulatory program, imposed on all citizens, adjusting the benefits and burdens of economic life to promote the common good by implementing valid public purposes. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980). These factors point all the more strongly toward requiring compensation in this case since the actions of the municipalities have had a devastating economic impact upon individual bondholders who are older persons particularly vulnerable to such harm.

The economic impact of a total loss of an investment is substantial for anyone, but it falls particularly harshly on the older person who depends upon investment income for his present and future livelihood. The Constitution should be interpreted in light of this reality, and, as it has often done in the

past, this Court should take the actual impact of governmental actions on the persons affected into account in doing so. Accordingly, the disproportionate harm caused to older persons by the actions of the participants in this case should be considered when deciding whether to review the decision below.

Because of older persons' dependence upon income they receive from the investment of their past wages, their security depends upon their ability to choose safe investments. Typically, an important investment goal of an older person is to maintain his principal intact to protect against the risk of poverty in old age, the possible need to pay high medical expenses, and the prospect of becoming wholly dependent upon his children or the state. Municipal bonds of the type issued by WPPSS have particular appeal to persons providing for their retirement, who value the security of a debt obligation and are less inclined to gamble upon the larger gains that might accompany a more risky equity investment. In this context, the assurances given by the participants as to the safety of the bondholders' investment — assurances often repeated and endorsed by independent bond counsel — take on a heightened significance. The expectations which were dashed in this case were more than just "reasonable" and "investment backed." They were the *sine qua non* for selling bonds to purchasers who were known to include many persons for whom the safety of governmental promises to repay loans was at the very essence of the bargain. Any analysis of the applications of the Takings Clause to this case should take that factor into account.

This Court's consideration of the "character of the governmental action" involved in this case should also take account of the lack of any other substantial relationship between the bondholders and the municipalities who have repudiated their promises. The respondents may try to justify their actions, and the decision of the court below, as merely part of the normal adjustment of the benefits and burdens of economic life for the public good. But whose and what "public good" is being served? Relatively few of the bondholders live in the Northwest, much less in the municipalities on whose behalf their funds were

spent. Out-of-state investors, especially those who are older persons, will not have much further involvement with the governments which have taken their property. They cannot hope to benefit from some countervailing, favorable policies (for example, cheaper power) made possible by the "program" being pursued by the municipalities. AARP submits that the participants' actions and the decision of the court below endorsing those actions and refusing to return the bondholders' funds, serve no plausible public purpose whose breadth is consistent with the nationwide distribution of the bondholders. The draconian substantive *ultra vires* rule invented by the court below accomplishes a total seizure of the bondholders' funds, yet does not and could not credibly explain what public good – other than enlarging the funds available to certain local municipalities – is served by visiting this result on the nationwide group of bondholders.

The bondholders' only realistic remedy is that which can be provided by this Court's review and reversal of the decision below. In the main, the non-resident bondholders cannot play any meaningful role in the political processes that led to the renunciation of the participants' obligations. They cannot expect that state judicial processes will protect them against the parochial pressures that so clearly shaped the result reached below. And insofar as they are older persons, they cannot simply return to work to recoup the substantial portions of their life's savings which they have lost. They are particularly dependent upon whether this Court will hold on the merits that the irresponsible acts of local municipalities who have repudiated their prior solemn assurances can be allowed to stand.

AARP accordingly requests this Court to rule upon the question of whether the Takings Clause imposes a limit on the extent to which governmental bodies may first induce investments in reliance upon their purported safety, then expend these funds, and later without justification decide not to repay or replace any of the bondholders' funds. AARP respectfully submits that, on consideration of the questions presented by the petititon, this Court should grant the writ.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Dated: New York, New York
March 4, 1985

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No. 84-1258 (9)

In The

Supreme Court of the United States

October Term, 1984

Chemical Bank and
Washington Public Power Supply System,

Petitioners,

—*v*—

Public Utility District No. 1 of
Benton County, Washington, et al.,

Respondents.

On Petition For A Writ of Certiorari
To the Supreme Court of the State of Washington

RESPONDENT FRANKLIN COUNTY PUD'S STATEMENT OF POSITION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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March 1, 1985

RESPONDENT FRANKLIN COUNTY PUD'S STATEMENT OF POSITION

Public Utility District No. 1 of Franklin County, Washington is a municipal corporation of the State of Washington established in 1934 to supply electricity to users within its boundaries. The Franklin County PUD currently serves approximately 15,400 customers.

The Franklin County PUD is a member of the Washington Public Power Supply System and a participant in Nuclear Projects 1, 2 and 3. The Franklin County PUD was also one of 88 utilities which entered into the Participant's Agreement with the Washington Public Power Supply System for construction of Nuclear Projects 4 and 5.

The Franklin County PUD encourages this court to grant the Petition for Certiorari.

Respectfully submitted,

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v.

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Respondents.

BRIEF OF RESPONDENT, INLAND POWER & LIGHT CO. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the decision of the Washington State Supreme Court invalidating the Participants' Agreements of the respondents violate the contract clause of the United States Constitution, Article I, Section 10, Clause 1?

2. Does the above decision of the Washington State Supreme Court work a "taking" of private property for public use without just compensation in violation of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution?

3. Does the above decision of the Washington State Supreme Court amount to the State of Washington's depriving any citizen of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages iii-v of the Petition for Certiorari correctly identify the parties to this litigation.

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BRIEF OF RESPONDENT, INLAND POWER & LIGHT CO. IN OPPOSITION TO PETITION FOR CERTIORARI

I.

OPINIONS BELOW

The petition for Certiorari, pages 1 and 2, properly sets forth the opinions below.

II.

JURISDICTION

Respondent, Inland Power & Light Co., urges that the petitioner, Chemical Bank, has failed to show any United States Constitutional grounds for this Court's jurisdiction either upon the contract clause, the taking clause, or the due process of law provision.

III.

STATEMENT OF THE CASE

This respondent, Inland Power & Light Co., adopts the statement of the case set forth in the brief of respondent, Washington Public Utilities Group, dated March 5, 1985. In addition to that statement, it is to be noted that the August 1983 judgment of the trial court, The Superior Court for the State of Washington, not only released the Public Utility Districts and the Cities involved with the Supply System, but also granted the motions for summary judgment on behalf of the other Participants and released them of liability under the Participants' Agreements on the basis of, among other things, mutual mistake and commercial frustration. Petitioner's second appeal to the Washington State Supreme Court followed and on November 6, 1984 the Supreme Court of the State of Washington rendered its opinion affirming the judgment of August 1983, and rèaffirmed its decision of June 1983. Its mandate was thereafter issued December 17, 1984.

IV.

REASONS FOR DENYING THE WRIT

The Washington State Supreme Court opinions should be accorded finality.

The Supreme Court of the State of Washington has twice adjudged that under the statutes and case law of the State of Washington the municipal participants (PUDs and Cities) did not have authority to enter into the Participants' Agreements; that their signing same was substantively ultra vires.

Respondent, Inland Power & Light Co., is not a municipal body; it is a cooperative corporation, incorporated under the Laws of the State of Washington. It and other respondent cooperatives were relieved of liability under the Participants' Agreements on the basis of commercial frustration and impossibility and of mutual mistake. It and the other parties, including the Washington Public Power Supply System, mistakenly assumed that the municipal parties did have authority to execute the Participants' Agreements. The State Court also, after careful analysis, ruled that the various equitable arguments of petitioner are not to be applied in this situation. *(Chemical Bank v. Washington Public Power Supply System* (Chemical Bank I) 99 Wn (2d) 772; 666 P (2d) 329 (1983); *Chemical Bank v. Washington Public Power Supply System* (Chemical Bank II) 102 Wn (2d) 874 (Nov. 1984).

The decisions by the Washington State Supreme Court carefully enunciate the law of the State of Washington.

A. The contract clause of the Constitution of the United States has no application to a state's judicial determination, and petitioner seems to have abandoned its contention in this regard.

B. The taking clause is not applicable here. Inland Power & Light Co. did not contract with the petitioner, Chemical Bank, nor with the bondholders. The Participants' Agreements are agreements with Washington Public Power Supply System. The bonds are not obligations of the participants. The bonds are obligations of the Supply System. The money advanced by the bond-

holders was advanced to the Supply System; not to the participants. The Washington courts have not ruled that the bonds are invalid. The Washington courts have ruled that the Participants' Agreements are unenforceable. The net effect is, of course, that the bonds are uncollectible but the fact is that none of the participants have taken anything from petitioner or from the bondholders. The bondholders still have their bonds. The bonds turned out to be uncollectible. The bondholders made a poor investment.

C. There is no lack of due process under the Fourteenth Amendment. The following quotation from *Howard v. Kentucky*, 200 U.S. 164 (1906) is appropriate:

> "He seems to make an issue with the court of appeals of the state upon the law of the state, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling *In Re Converse*, 137 U.S. 624, 631, 34 L. Ed. 796, 799, 11 Sup. Ct. Rep. 191, and other cases, which hold that a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction'.
>
> "We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state, common, statutory, and constitutional. Our inquiry can only be, Did the state law, as applied, afford plaintiff in error due process, as those words are used in the 14th Amendment?"

The petitioner, Chemical Bank. opted to frame its lawsuit as one asking for a declaratory judgment in May 1982. Petitioner, Chemical Bank, chose the forum: The Courts of the State of Washington. The many issues

presented were, on many occasions, argued in the Superior Court of the State of Washington in Seattle; and on two occasions the Supreme Court of the State of Washington very carefully reviewed the procedures and issues. The parties involved have had repeated and full hearings and consideration of their positions. It is submitted that there was no lack of "due process of law" in the history of this case.

V.

CONCLUSION

Despite the magnitude of the default involved, there is no Federal question presented. The opinions of the Washington State Supreme Court should be recognized as conclusive and petitioner's application for certiorari should be denied.

Respectfully submitted this 26th day of March, 1985.

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FILED
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No. 84-1258

IN THE
Supreme Court of the United States

October Term, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF BENTON COUNTY, WASHINGTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

BRIEF OF RESPONDENTS PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON AND PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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I. IDENTITY OF RESPONDING PARTIES

These responding parties are Public Utility District No. 1 of Chelan County, Washington ("Chelan"), and Public Utility District No. 1 of Douglas County, Washington ("Douglas"). In 1976, Chelan and Douglas each entered into a "Participants' [sic] Agreement" purchasing a portion of the "project capability" of Projects Nos. 4 and 5 of the Washington Public Power Supply System ("Supply System").

II. POSITION OF RESPONDING PARTIES

Chelan and Douglas support the granting of the Petition for Certiorari.

III. BASIS FOR GRANTING THE PETITION

As indicated, in 1976 Chelan and Douglas entered Participants' Agreements. One purpose of the Participants' Agreements was to provide a source of revenue for repayment of revenue bonds issued by the Supply System to construct Projects Nos. 4 and 5.

Chelan and Douglas believed in 1976, and continue to believe, that they had authority to enter the Participants' Agreements. They made all payments required by the Participants' Agreements either directly to the Supply System or to an escrow account established by the Superior Court for King County, Washington, until the decision of the court below, *Chemical Bank* v. *Washington Public Power Supply System*, 99 Wn. 2d 772, 666 P.2d 329 (1983). Chelan and Douglas supported the trial court's determination upholding authority.

Chelan and Douglas believe the decision in the court below constituted a change in the law of Washington. Chelan and Douglas believe the enormity of the loss to bondholders and the significance of the issues raised by petitioners warrant this Court's review. Rule 17.1.

IV. CONCLUSION

In conclusion, Chelan and Douglas respectfully urge this Court to grant the petition and reverse the decision below.

DATED this 29th day of March, 1985.

Respectfully submitted,

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21 RESPONDENTS' BRIEF OPPOSING CERTIORARI

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The 21 Respondents[1] (among the 88 respondents in this case) submit this brief to support their respectful request to this Court to deny certiorari.

The decision and record of this case neither (a) support the facts postulated in the Questions Presented by the Petition[2] nor (b) present the constitutional issues (of Takings and Due Process) that Petitioners assert.

We adopt the statement of Questions Presented by the Nine Respondents.

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1. *Oregon Cities:* City of Bandon. *Montana Cooperatives:* Glacier Electric Cooperative. *Nevada Cooperatives:* Wells Rural Electric Co. *Washington Cities:* City of Port Angeles, Centralia Electric Light, McCleary Light and Power. *Washington Cooperatives:* Elmhurst Mutual Power & Light Co., Ohop Mutal Light Company, Okanogan County Electric Cooperative, Inc., Parkland Light & Water Co. *Idaho Cities:* Cities of Bonners Ferry, Burley, Heyburn, Idaho Falls and Rupert. *Idaho Cooperatives:* Clearwater Power Co., Idaho County Light & Power Cooperative Assn., Inc., Northern Lights, Inc., Prairie Power Cooperative, Inc., Rural Electric Co. and Unity Light & Power Co. Of these 21, three (the Washington cities) were subject of the decision in *Chemical Bank v. WPPSS ("Chemical Bank I")*, 99 Wn. 2d 722, 666 P. 2d 329 (1983), and all were subject of the trial court judgment dated August 11, 1983 affirmed by *Chemical Bank v. WPPSS ("Chemical Bank II")*, 102 Wn. 2d 874, 691 P.2d 524 (1984).

2. Some of the facts that the Petition asserts contain no support in the record. Some of the factual assertions are simply false. Of those, none is a fact of which judicial notice may be taken. The Petition undertakes to support some of these assertions by presenting items of information from outside the record (Attachments A & B and Note 4, p. 8). Other assertions are unsupported even by items beyond the record. Petitioners have asserted as "facts" in their petition many of the issues which they are currently litigating in *Chemical Bank III (Chemical Bank v. Public Utility Dist. No. 1 of Benton County, et al.*, C83-1080); *Washington Public Power Supply System Securities Litigation*, MDL No. 551, USDC; *M.G.I.C. Indemnity Corp. v. Public Utility Dist. No. 1 of Benton County, et al.*, C84-690, USDC; and *Frederic Haberman, et al. v. Chemical Bank and WPPSS, et. al.*, 84-2-06452-8, Superior Court of Washington. In these securities cases, the issues currently involved in intense discovery for resolution at trial include many of the "facts" Petitioners raise here—representations of Participants, approval of official statements by Participants, supervision of the projects, basis for the sale of bonds (Petit. 3); WPPSS as an instrumentality of the Participants (Petit. 4), marketing of the bonds (Petit. 6), reliance by Bondholders (Petit. 6, 16, 21), security for the bonds (Petit. 6, 16). None of these "facts" is in the record in this case. Nor are they "facts"; they are issues being litigated in the many suits pending in federal and state court on behalf of Bondholders.

I. STATEMENT OF THE CASE

A. Parties.

Petitioner Washington Public Power Supply System ("WPPSS") was created in 1957, pursuant to Washington statute. Although during the period in question it did not lack income or "lack substantial assets of its own" (contrary to Bondholders' assertion (Petit. 4)), WPPSS did lack unencumbered assets and income, and it did lack equity. It could only acquire additional assets by borrowing.

Petitioner Chemical Bank (hereafter "Bondholders") is the trustee under WPPSS' Bond Resolution for all holders of bonds issued by WPPSS for its nuclear plant Projects No. 4 & 5. The Petition asserts that the WPPSS No. 4 & 5 bonds are held by people who are especially in need of protection by the law, the Constitution and the courts.[3] The record, however, tells nothing about who owns these bonds, as most of them are unregistered and all are bearer bonds (Petit. 8, n.5).

The Petition concludes with a plea to resist "pressures to protect the public against unwise decisions taken in its name — at the expense of politically powerless minorities" (Petit. 28).[4] As to this, it may be observed that the individual owners of tax-exempt bonds undoubtedly are a minority in American society and, of course, they have constitutional rights. But the record does not show that these bondholders' financial station differs from that of most of those people whose level of taxable income induces purchase of tax-exempt securities.

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3. For example, the Petition claims that many of the Bondholders had invested their life savings in the bonds (Petit. 28); "frequently for the retirement income they were expected to provide" (Petit. 9).

4. The petition does not disclose that in addition to the individual holders of bonds, it is probable that the majority of bonds were purchased by large institutional investors with sophisticated research staffs, rather than individuals. For example, it is a matter of public record that the Bondholders which have filed suit in *Haberman v. WPPSS (Frederic Haberman, et al. v. Chemical Bank and WPPSS, et al.*, 84-2-06452-8), total approximately $340 million, most of which is held by U.S. Trust Company Bank, American Express, and its affiliates.

Respondents (hereafter "Participants") are local electrical utilities:

43	Rural electrical cooperatives among six northwest states
23	Public utility districts in Washington and Oregon
21	Cities and towns in Washington, Oregon and Idaho
1	Irrigation district in Washington
88	Total Participants

All distribute electricity to consumers. Except for some of the larger communities, which have hydroelectric dams, none produces more than a negligible quantity of electricity itself, and most produce none.[5]

B. Events.

1. *Participants' Agreement.*

WPPSS prepared a contract ("Participants' Agreement") and submitted it to each of the Participants. In July, 1976, representatives of WPPSS and each Participant signed this instrument.[6]

All 88 copies contained identical language and terms. Each had 63 pages, plus exhibits. The only blanks were for a Participant's name and share and the date of execution. Each Agreement was made subject to the 117-page WPPSS Board of Directors Resolution No. 890 (the "Bond Resolution").[7] The Bond Resolution, in turn, constituted a contract between WPPSS and the bondholders.[8]

---

5. During this proceeding, McCleary, Washington, not the smallest of the 88, had 708 user/ratepayers (21 Petitioner's Br. 50); Okanogan had 3 employees and fewer than 1,500 customers (CP 1241); Idaho County Light had 1,700 members (CP 1243).

6. *Chemical Bank II*, at p. 881.

7. Agreement § 25, p. 60

8. Bond Resolution § 14.1; CS 128, Attachment; CP 6605 - record in Washington Supreme Court.

Each Participant completed and signed, in response to instructions, a form resolution, a form resolution certificate, a form certificate of counsel and a form attorney's escrow letter.[9]

By the terms of the Participants' Agreement and the related Bond Resolution, WPPSS was to borrow money by issuing tax-exempt *revenue* bonds. With the borrowed proceeds, WPPSS was to build two plants (WNP No. 4 & 5) that would use nuclear energy to generate electricity. These projects were to be self-liquidating. They would produce electricity that WPPSS would sell to the Participants, which essentially would serve as WPPSS' distribution network. The revenues that WPPSS would derive from the sale of electricity from WNP No. 4 & 5 would be used to pay the interest and principal on those bonds that it issued in connection with those Plants.

By the terms of the Participants' Agreement, each Participant agreed to buy from WPPSS a specified share of the electrical output to be produced by WPPSS from the two plants. It was in essence a supplier contract.

Disputed in this case was the interpretation of this Agreement: whether or not it constituted an unconditional commitment by each Participant to pay WPPSS even if WPPSS never delivered to that Participant the supply of electricity that it had sought to buy. The Washington Supreme Court did not rule on this question, basing its decisions on other grounds.[10]

2. *WPPSS Sold the Bonds and Spent the Proceeds.*

Pursuant to this undertaking, WPPSS borrowed over $2 billion by issuing *revenue* bonds for that amount.[11]

The legal counsel that WPPSS retained (Wood & Dawson as bond counsel in New York, plus a Seattle firm as special coun-

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9. CS 474, Ex. 10; CP 2459.

10. *Chemical Bank I*, at p. 781, n.1. The Superior Court ruled that section 6(d) of the Agreement (Petit. App. B-5) constitutes such an unconditional obligation. For purposes of this brief opposing certiorari, we assume the Superior Court interpretation to be correct.

11. The record contains no support for the Petition's statement that WPPSS "issued the bonds at the direction, and for the benefit, of 88" Participants (Petit. 3).

sel) issued their opinion in the Official Statement for each bond issue. The opinion declared that at least 72 of the Participants had legal authority to enter the Participants' Agreement. The Participants themselves did not retain bond counsel. However, the local counsel of each of the 88 Participants signed and returned to WPPSS the "form certificate of counsel" submitted to each Participant by WPPSS.[12]

The bond proceeds all went to WPPSS, the borrower, and all were spent "for its purposes"[13] by WPPSS, which over the years had grown to a size that gave it a momentum and purpose of its own. WPPSS spent some of this money on the two construction projects, paid some to underwriters[14] and spent some on administration. (In November 1980, WPPSS employed more than 2,000 people, of whom more than 1,000 were "in executive, finance and administrative functions."[15]) WPPSS devoted the rest to pay interest on its earlier borrowings (Petit. App. B-31).

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12. From these facts, the Petition derives its repeated assertions that the Bondholders (or their predecessors) had bought in reliance on representations by Participants (Petit. 6, 16, 21). Some amicus briefs support the Petition by characterizing these facts as "inducement leading to the creation of an investment-backed expectation" (PSA Amicus B. 91-10). It should be noted that (1) local counsel letters do not appear in any official statement; (2) the only reference to them is in the opinion letters of bond counsel and special counsel which do appear on the official statements; and (3) the bond counsel and the special counsel opinion letters indicate that they relied on local counsel letters *only* for procedural matters involved in the execution of the Agreement (i.e., signature, quorum of approving meeting, etc.) and not for substantive authority which was the subject of the Washington Supreme Court decisions.

13. *Chemical Bank II*, 102 Wn. 2d at 911. The Participants no more directed the spending of this money than they had directed its borrowing. The record contains no support for Petitioners' claims that "The participants then supervised the irretrievable expenditure of the bondholders' funds" (Petit. 3) and Participants "overseeing the expenditure of that vast sum" (Petit. 14).

14. The underwriters that have filed a motion for leave to submit an amicus brief are the same underwriters which participated in every WPPSS bond offering for WNP 4 and 5 and for WNP 1-3. Their underwriting fees, expenses, and profits total in the millions of dollars. Their profits from trading these same WPPSS bonds in the secondary market are even higher. It is incredible that these underwriters now claim that Participants, rather than WPPSS, received a "benefit" from the sale of WPPSS bonds. The Participants received not one dollar; the underwriters millions.

15. Washington State Senate WPPSS Inquiry, Vol. I, p. 8 (CS 1081; CP 3).

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The Petition inaccurately asserts that the bond proceeds went to the Participants: "For five years the Participants had the use of the Bondholders' money" (Petit. 20); "appropriation of the Bondholders' property" (Petit. 11); "expressly promising that they would repay the loan" (Petit. i); "denying any obligation to return any portion of the Bondholders' funds" (Petit. 4); "refused to return any portion of the Bondholders' funds" (Petit. i and 8).[16]

However, not a dollar reached the Participants. They were not the borrowers, and not the recipients of the borrowed money, but rather the alleged obligors (under an unenforceable contract) of WPPSS' own debt. *Chemical Bank II*, at 907. The Participants not only received no money, they also received none of the electricity for which they had bargained.

In 1982, announcing that its credit had run out, WPPSS abandoned the two projects, one-fifth complete.[17] No income could be derived from the generating plants that were to earn the revenue to pay off these revenue bonds. WPPSS' only income and assets other than the unfinished projects were apparently subject to prior encumbrances.

3. *Action for Declaratory Judgment.*

In light of WPPSS' prospective inability to pay when its debts came due, the Bondholders' Trustee, Petitioner Chemical Bank,

16. Likewise, all five of the amicus briefs that have been offered in support of the Petition have asserted that the Bondholders' money went to the Participants, which then refused to pay it back: "the participants' retention of over two billion dollars" (PSA Amicus Br. 9); "refusing to return the bondholders' funds" (AARP Amicus Br. 7).

17. *Chemical Bank I*, at 776; Bond Resolution 1203. The record contains no support for the Petition's claim (Petit. 7) that the Participants refused to allow WPPSS to borrow more money, or to continue the projects, and that such refusal caused abandonment.

brought this action. It sought a declaratory judgment that the Participants owed WPPSS enough money to enable WPPSS to pay the debts that it had incurred to the Bondholders. In substance, the Bondholders asserted the position of third-party beneficiaries of the contracts (Participants' Agreement) between WPPSS and the Participants.

The Participants defended against this action, asserting several defenses. Among them were defenses that the Washington municipalities lacked statutory authority to enter the Participants' Agreement and that, as to them, this Agreement violated the State Constitutional debt limit.[18]

The Washington Supreme Court, in *Chemical Bank I*, ruled that the unconditional payment commitment of the Participants' Agreement was unenforceable as to Participants that were Washington municipalities. Thereafter, in *Chemical Bank II*, the trial court on August 11, 1983, resting its summary judgment on all undisputed facts before it,[19] rejected the Bondholders' equitable claims (unjust enrichment, etc.) against all Participants (Petit. App. D). Then WPPSS' next debt payment came due on the bonds. At that time, as the trial court declared, WPPSS "insofar as Projects 4 and 5 is concerned, is now insolvent" (Petit. App. C-7). Also, some of the Participants raised their rates and put the payments into a court-approved escrow pending the outcome of this litigation and some of them paid directly to WPPSS.[20] Unable to pay, WPPSS did not pay, and Chemical Bank declared a default.

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18. A partial basis for the ruling. Concurring opinion by Dore, J., *Chemical Bank I*, at 801-04.

19. The Petition attempts to create the impression that the Bondholders had no opportunity to submit facts before this summary judgment hearing. That impression is false. *See* discussion at p. 13, *infra*.

20. Characterized by proponents of certiorari as, "participants willfully destroyed the security for the bonds" (PSA Amicus Br. 10).

The August 11, 1983 judgment was affirmed by the Washington Supreme Court in *Chemical Bank II*.[21] The Petition to this Court followed.

Although WPPSS has defaulted, it has not repudiated its debts. It continues to owe the full amount of its debts to the Bondholders and it continues to operate, but apparently those of its assets not encumbered by other creditors are insufficient to pay the bonds in full. WPPSS joins as a Petitioner here, presumably toward the end of restoring its lost credit standing and borrowing capacity.

II. REASONS FOR DENYING THE WRIT

A. Petitioner WPPSS — The U.S. Constitution Does Not Protect a State From Itself.

Petitioner WPPSS, a Washington municipal corporation, fails to raise a Federal question by its claim that it has been denied rights under the 14th Amendment by a court of the State that created it. *Williams v. Baltimore*, 289 U.S. 36, 40 (1933). The Bill of Rights protects people from government, not one branch of a state from another.

B. Petitioner Chemical Bank (Bondholders) — A State Court's Erroneous Interpretation of State Law Violates Neither Due Process Nor The Takings Clause.

The Bondholders do not raise a federal question by pursuing a contract claim against municipal corporations. *Manila Investment Co. v. Trammell*, 239 U.S. 31, 32 (1915). The Bondholders declare that "this case raises serious questions about municipal financing, public morality and trust in government" (Petit. 28). Maybe. But are those federal questions?

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21. In explaining why the doctrine of *ultra vires* had been retained for governmental entities, while it had been discarded for private corporations, the Washington Court declared that:

> Unlike a corporate shareholder, who may choose the corporate bodies in which she invests and withdraw her investment at will, a citizen and taxpayer has only one government in which to "invest" and may not withdraw except by death or expatriation.

Noel v. Cole, 98 Wn.2d 375, 379, 655 P.2d 245 (1982).

In *Chemical Bank I*, the Washington Supreme Court decided a question of state law: whether the Washington municipal Participants were contractually obligated to commit themselves under the Participants' Agreement. In interpreting similar contracts concerning other WPPSS projects, the Ninth Circuit held that state law, not federal law, was applicable even where the United States was a party to the contracts.[22]

Then in *Chemical Bank II*, the Washington Court upheld the summary judgment on the Petitioner Bank's equitable claims as to *all* Participants. This too concerned questions only of state law.

The Petitioners dispute the Washington Supreme Court on many of its rulings, including those on *ultra vires*, mutual mistake, restitution, equitable estoppel and frustration of purpose (Petit. 19-26). Authors of several legal articles have also criticized the Washington Supreme Court for both its holdings and its opinions in this case (Petit. 12, n.6), as have several amicus briefs.[23] The dissenting opinions on the Court itself have done the same. Even if *Chemical Bank I & II* were mistaken, and even if these opinions, interpreting Washington statutes and aspects of the common law of contracts, expressed unsound analyses of contractual relationships and displayed an incorrect application of precedent, without more, such an error by a state court interpreting state law does not deny due process. *Engle v.*

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22. *City of Springfield v. WPPSS*, Nos. 83-3927, 85-4054 (9th Cir. Feb. 4, 1985). The Ninth Circuit applied state law in determining the authority of a group of public utilities (among which are many of the 88 respondents/Participants in the case at bench) to enter a three-party contract with WPPSS and the Bonneville Power Administration for WPPSS' Nuclear Generating Projects Nos. 1, 2 and 3. The Ninth Circuit decision held that state law should be applied to interpret the contracts, not federal law as the Oregon District Court had held.

23. *Chemical Bank II*, at 894 and 905. The amicus briefs do not raise any additional substantive arguments not raised by Chemical Bank. They do suffer from the same defects of (1) attempting to inject sympathy on the basis of matters outside the record, and (2) obvious misstatements of the record.

Isaac, 456 U.S. 107, 121 (1982). The Washington Court's errors — if it erred — in determining contract claims against cooperatives and municipal corporations raised no Federal question.[24]

C. Alleged Denial of Procedural Due Process.

1. *State Justices' Failure to Recuse Themselves.*

The Petition complains that, "The Court below, composed of elected Justices, failed even to address the question whether any of its members should be disqualified from hearing the appeal" (Petit. 27). For a United States court to overturn a state court decision on the basis of the state judge's parochial bias or subjection to constituents calls for substantial proof.[25]

Not until *after* the Washington Supreme Court had ruled against the Bondholders in *Chemical Bank I* did their Trustee (which had chosen to bring this action in state court) request that members of that Court should disqualify themselves for living in "communities served by respondents" (Petit. 27, n.22).

In *Chemical Bank II*, the Court ruled against WPPSS and the Bondholders by a 6 to 3 vote. Yet according to the Petition, only one member of the *Chemical Bank II* majority resided in a community served by one of the respondent/Participants (Petit. 27, n.22). This member was the late Justice Rosellini, who died November 26, 1984, three weeks after filing the Court's opinion, which he had written.

Judges customarily rule on the validity of statutes that impose taxes to which the judges are subject, since their "financial stake

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24. "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . (or) immunity from judicial error . . . . Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55 (1962) (citation omitted).

25. Aside from charges of motives, not even the effect of these decisions was clearly a "home town decision" in view of the fact that (1) some Bondholders live in Washington, (2) some customers of Participants live outside Washington, and (3) ruling against the Bondholders exposed the population of Washington to the pending claim against the State for the full burden of the debt (*Chemical Bank II*, dissent, at p. 914).

in the outcome of the litigation" (Petit. n.22) is considered too small to create an interest in the outcome. The Petition has noted that if the Participants were held obligated to WPPSS and thereby to the Bondholders, a customer of a Participant would sustain increased electricity charges of .5 cents per kwh (Petit. 8, n.4). Is this prospective addition to one's light bill a "substantial pecuniary interest"[26] that disqualifies a judge?

2. *Claim That "The Bondholders Had No Notice Or Opportunity To Protect Their Rights."*

In ruling on issues of mutual mistake and equitable estoppel, the Washington Supreme Court observed that the Participants' Agreement could have been subjected to "judicial determination of the authority question" (*Chemical Bank II*, at 988 and 905) before the bonds had been issued.

In response to this, the Petition asserts (Petit. 18-19 and 26-27) that the Bondholders had no notice of such opportunity and, furthermore, that opportunity was denied them because Washington law did not provide for it. The Petition concludes that such a "retroactive invocation . . . of an unavailable remedy" (Petit. 27) denied them procedural due process.

But a remedial opportunity *was* available.[27] Such test cases, determining the prospective validity of municipal bond issues, are often undertaken because occasional adverse adjudications[28] may suggest that failure to test increases investors' risk.[29]

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26. "(T)hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

27. RCW (Revised Code of Washington) 7.25.010. *"Validity of bond issues may be tested.* Whenever the legislative or governing body of any county, city, school district or other municipal corporation or taxing district, shall desire to issue bonds and shall have passed an ordinance or resolution authorizing the same, the validity of such proposed bond issue may be tested and determined in the manner provided in this chapter."

28. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 329 (1958), *Pierce County v. Taxpayers Lakes Dist.*, 70 Wn.2d 375, 423 P.2d 67 (1967), *Port of Longview v. Taxpayers*, 85 Wn.2d 216, 533 P.2d 128 (1974).

29. The promised return of 14% on some of these bonds may have suggested to investors that they faced a comparatively high risk.

Of course, the Bondholders themselves could not have brought a test case as to bonds that they had not yet bought. However, Chemical Bank could have requested that WPPSS, as the issuer-borrower, undertake such a prudential measure before the Bank consented to become the Trustee for the Bondholders under the Bond Resolution, which was adopted in advance of the bonds' issuance.

In addition, the Bondholders' Trustee could have avoided in another way the risk presented by any Participants' uncertain contractual authority. As has been successfully done in other jurisdictions,[30] Petitioner Bank could have sought statutory authorization for such an unconditional obligation by a municipal corporation.

Because (a) the Trustee had notice of the availability of this protective measure by reason of the Trustee's presumed knowledge of the law in the jurisdiction where the bonds were to be issued, and because (b) by Washington law "private parties dealing with a government agency are charged with knowledge of the agency's authority,"[31] the Washington Court did not deny due process when, in dictum, it discussed this failure to test the Participants' authority.

3. *Claim That The Washington Court Decided Critical Factual Issues Without Allowing Bondholders A Chance To Be Heard.*

The Washington Court held that those Participants that are Washington municipal corporations had lacked statutory authority to commit themselves, on behalf of their citizen ratepayers, to an unconditional obligation to pay for constructing the plants. On the basis of prior Washington cases, and after analysis of every conceivable statutory underpinning, the Court

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30. North Carolina, Gen. Stat. § 6-23.110 (language almost identical to that of Participants' Agreement § 6(d); Virginia Code, § 15.1-1611; Massachusetts, Gen. Laws Ann., Ch. 13, § 5(1) and § 6; Maine Rev. Stat. Tit. 35, § 4103 (1) (B); Vermont, Stat. Ann. Tit. 30, § 604 (2) and § 5013(a).

31. *Noel v. Cole, supra*, note 15, 98 Wn.2d at 379; and this includes purchasers of municipal bonds. *State of Washington v. Maricopa County*, 152 F.2d 556, 561 (9th Cir. 1945), *cert. denied* 327 U.S. 799 (1946).

further held, however, that these municipal corporations nonetheless would have authority to bind themselves by such a commitment only if they either owned the project or possessed sufficient control under the Agreement to be the equivalent of ownership.[32]

No one claimed that the Participants owned WPPSS. There remained the question whether they had enough "control to constitute the equivalent of an ownership interest" (*Chemical Bank I* at 787). To answer that question, the Court examined the Participants' Agreement which embodied the contractual relationship between WPPSS and the 88 Participants. The Court concluded that, as a matter of law, the contract provided insufficient control to be the equivalent of ownership. This was a legal decision, not requiring a factual conclusion.

The Washington Court also rejected the Bondholders' theory of equitable estoppel as a basis for enforcing that contract claim (*Chemical Bank II*, at 905). As to this, Petitioners claim that on remand after *Chemical Bank I*, the trial court "without hearing any evidence" (Petit. 11) entered summary judgment dismissing Petitioners' various additional theories of recovery, including equitable estoppel. However, the summary judgment motion, like all such motions, was decided on the basis of all uncontested evidence that the parties submitted. Respondent/Participants submitted evidence in the form of affidavits (*Chemical Bank II* at 2178-79, 2181, 2183-87, 2189-2196, 2198). If the trial court ruled without evidence of Petitioners, it was only because Petitioners failed to submit any. Petitioners did not claim that they needed additional time to obtain evidence as they could have done pursuant to the state counterpart of F.R.C.P., Rule 56(f). Because they chose to litigate on the basis of legal issues and the factual record made by the moving parties, they cannot claim that the Washington Supreme Court denied them due process by affirming the trial court's ruling on the factual record made by both respondent/Participants *and* Petitioners.

The Bondholders claim (Petit. 23-26) that they were denied procedural due process by the Washington Court's failures to require evidentiary hearings on these two issues (equitable estoppel and control). However:

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32. *Chemical Bank I*, at 787; reaffirmed by *Chemical Bank II*, at 893.

(a) Because the Washington Supreme Court ruled these to be questions not of fact but of law,[33] evidence was not needed. The Supreme Court's reference to facts to demonstrate that its legal interpretation of the contract is correct does not render its legal decision defective.

(b) Although this case was not tried, it went through two trial court judgments, each reviewed on appeal. In the trial court proceedings, the Bondholders offered no evidence, by affidavit or otherwise, on these issues. The record before the Washington Supreme Court when it decided *Chemical Bank II* comprised a total of 2,612 file items, which were composed of about 17,000 pages. This ruling was not an instance of a court striking a complaint in excessive reliance on judicial notice.

D. Alleged Unconstitutional Taking.

1. *Participant Municipal Corporations' Failure to Pay WPPSS' Contract Claim.*

The Takings Clause has not been interpreted to mean that a governmental unit, by declining to pay a contract claim that may be legally unenforceable, is thereby committing "state action" that constitutes a "constitutional taking."

The Takings Clause has been used to make an injured party whole where regulation by government has imposed such a heavy economic burden on one party or class of parties that fairness calls for shifting this burden to the general public. The case before this Court does not concern regulation that may have gone so far as to call for some rectifying compensation. None of the Participant electrical utilities undertook to regulate bondholders.

Petitioners argue that Respondents interfered with the bondholders' reasonable investment-backed expectations. Here, even if the Bondholders' investments were accompanied by such expectations, such "interference" amounting to a constitutional taking was not committed by a municipal electrical

33. *Chemical Bank II*, at 894 and 9805.

utility when it failed to fulfill a contract that a court had adjudicated to be void.

2. *Washington Court's Decisions That Contract Claim Was Unenforceable Against the Participants.*

No taking was committed by the Washington municipalities which defended themselves in a lawsuit brought by Chemical Bank. Also, no taking was committed by the Washington Court when it judicially determined that the agreement was beyond the statutory authority of the Washington municipalities.

The Takings Clause has not been interpreted to mean that it has been violated by a state court that applies state law to determine that a contractual provision is unenforceable.

The Washington Court did not act in any of the few ways that this Court has held that a judicial decision itself can deny a constitutional right: The Washington Court did not discriminate against an entity or group where fairness called for uniform treatment, *Shelley v. Kraemer*, 334 U.S. 1 (1948), nor did it apply a defamation remedy in a way that violated First Amendment rights.

Petitioners assert (Petit. 17-21) the case of *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155 (1980), as authority for their claim that the Washington Supreme Court's decisions constituted a constitutional taking. In *Webb's*, the taking was caused by application of a state statute that declared:

> All interest accruing from moneys deposited shall be deemed income of the office of the clerk . . . .

449 U.S. at 156. This statute transformed private property into public property without compensation:

> The state statute has the practical effect of apropriating for the county the value of the use of the fund for the period in which it is held in the registry.

449 U.S. at 164.

The Florida Court there had sanctioned the statute and interpreted its meaning, probably correctly. But the taking was imposed by the statute. By contrast, in the case now before this

Court, the complained-of action is court decisions denying a private contract claim by interpreting a contract in light of the state's statutes and common law of contracts.

E. This Case Does Not Involve Federal Questions — It Is a Matter of State Law Only.

The Washington Supreme Court has ruled twice (*Chemical Bank I and II*) on its interpretation of Washington statutory law. Petitioners point out that the Oregon Supreme Court ruled that its municipal participants did have authority under Oregon law (Petit. 14) and that the Idaho Supreme Court ruled that the Idaho municipal participants did not have authority under Idaho constitutional law to enter the Agreement (Petit. 13).[34] In addition, the Wyoming Supreme Court upheld a public utility commission denial of an increase in the rates of a Wyoming private utility participant in WPPSS project No. 5 on the grounds that the project was not "used and useful." *Pacific Power & Light Co. v. The Public Service Commission of Wyoming, et al.*, 677 P.2d 799 (Wyo. Feb. 7, 1984).[35]

These different state court decisions merely reflect that state laws and constitutions are different and therefore different results may occur. The Washington decisions are based on statutory, not constitutional, law; the Oregon decision is founded

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34. Petitioners' statement that the Idaho Participants "successfully sought a decision on the lack of their authority . . ." (Petit. 13) is false. The Idaho case was brought by *ratepayers*, not by participants (*Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983), cert. *denied*, 105 S. Ct. 219 (1984)). Similarly, Petitioners' statement that "after the (Idaho) Supreme Court decision, the Washington Superior Court relieved the Idaho participants from any liability" (Petit. 13, n.7) is at least misleading, if not totally false. The Idaho Supreme Court initially entered a Writ of Prohibition on November 3, 1982, before any hearing, merely precluding payment by Idaho cities pending resolution of the Idaho case. The Washington Superior Court entered its summary judgment on August 11, 1983, dismissing Petitioner's claims against the Idaho cities after remand from Chemical Bank I. The actual decision on the merits in the Idaho case was rendered on September 26, 1983, over one month *after* the Washington Supreme Court decision.

35. The Wyoming Supreme Court agreed with the Washington Supreme Court ruling in *Chemical Bank II* and therefore declared as moot the appeal of Lower Valley Power & Light, Inc. and Chemical Bank to reverse the Public Service Commission's denial of a rate increase to Lower Valley as a participant in WNP 4 and 5.

on the fact that Oregon is a home-rule state, and Washington is not; the Idaho decision is based on Idaho's Constitution which differs from both Washington's and Oregon's; and the Wyoming decision is founded upon public utility commission regulation of electrical rates. Application of these different state constitutions, statutes, and case laws does not create a federal question. *See Asson. v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) *cert. denied*. 105 S. Ct. 219 (1984).

III. CONCLUSION

Chemical Bank commenced an action in Washington state courts in an attempt to enforce what they argued was a valid contract claim. They lost.[36] If that event created a federal claim to be litigated in this Court, it would quickly be buried in decisions in which a state court ruled against either party to a contract or where a state or its municipality successfully defended against unenforceable contract claims.

The Petition for Certiorari should be denied.

Respectfully submitted April 5, 1985.

JOHN D. LOWERY
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Counsel for 21 Respondents

36. Petitioners then commenced an action against the same defendants in federal court *(Chemical Bank III)* which is progressing through discovery toward a March 1, 1986 trial date. Chemical Bank originally joined 500-600 individuals in this federal case. All of the 100 plus individuals affiliated with these 21 respondents (along with several hundred more) were dismissed from the federal court case on motions to dismiss. Chemical Bank did not choose to sue any of the underwriters which sold WPPSS bonds, notwithstanding that the MDL class plaintiffs did sue them. Chemical Bank may have chosen not to sue the underwriters because the bank itself was an underwriter of over $30 million in WPPSS bonds on WNP 1-3.

No. 84-1258

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

—v.—

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

NINE RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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April 4, 1985

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April 4, 1985

QUESTIONS PRESENTED

1. Did investors in tax-exempt revenue bonds issued by the Washington Public Power Supply System ("Supply System") to finance construction of two of its nuclear projects have a property interest that was taken by the Washington Supreme Court when it determined that:

(a) No Washington statute authorized cities and public utility districts in that state to enter a complex contractual arrangement with the Supply System (the "Participants' Agreement") for the purchase and redistribution of the projects' generation capability;

(b) No doctrine of Washington law otherwise permitted enforcement of the Participants' Agreement against those Washington municipal entities, which had purchased approximately 70% of the project capability of the two nuclear plants; and

(c) Lacking 70% of the contractual undertaking, the Participants' Agreement was unenforceable against the remaining participants under well-established principles of state law governing contract formation and performance?

2. Did the Supreme Court of Washington deny any due process rights of investors in tax-exempt revenue bonds issued by the Supply System when it determined as a matter of law, upon undisputed facts and in accordance with the procedural rules of Washington state courts, that the Participants' Agreement exceeded the statutory authority of Washington cities and public utility districts and was therefore unenforceable against the remaining participants?

PARTIES TO THE PROCEEDING

The Petition for Certiorari sets forth the parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by nine utilities that are respondents herein and were respondents below. The "Nine Respondents" are as follows:

Big Bend Electric Cooperative, Inc., Washington;
Lincoln Electric Cooperative, Inc., Washington;
City of Milton-Freewater, Oregon;
Missoula Electric Cooperative, Inc., Montana;
Ravalli County Electric Cooperative, Inc., Montana;
Salmon River Electric Cooperative, Inc., Idaho;
Tanner Electric Cooperative, Washington;
Vera Irrigation District No. 15, Washington; and
Vigilante Electric Cooperative, Inc., Montana.

The Petition for Certiorari incorrectly identifies two of the Nine Respondents. Vera Irrigation District No. 15 is incorrectly identified as Vera Irrigation District No. 10, and Ravalli County Electric Cooperative, Inc. is incorrectly identified as 'Pavelli' County Electric Cooperative, Inc.

None of the Nine Respondents has any subsidiaries or other affiliates. The Nine Respondents are unaware of any affiliates or subsidiaries of other respondents.

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STATEMENT OF THE CASE

Introduction

As many as 113 nuclear generating plants across the nation have been terminated prior to completion within the past 12 years, occasioning losses of billions of dollars.[1] This case involves the termination of two nuclear plants that were being built by the Washington Public Power Supply System ("Supply System").

Like shareholders and investors in other companies involved in nuclear generation, investors in revenue bonds issued for Supply System Nuclear Projects Nos. 4 and 5 are disappointed with the losses they have realized due to problems in the nuclear industry. They are distressed that the Supreme Courts of Washington and Idaho did not construe the enabling statutes of municipal corporations as broadly as was anticipated by the architects of the complex financing scheme for those projects. They also take issue with the Washington court's determination that the Participants' Agreement for Projects 4 and 5 was invalid and unenforceable under fundamental principles of contract law. Neither of those rulings, however, nor any action of the participant utilities in Projects 4 and 5, raises a federal constitutional question.

Background

For many years, hydroelectric power has been the chief component of electricity generated in the Pacific Northwest. The federal government assumed the primary role in generation and transmission of hydroelectric power by creating the Bonneville Power Administration ("Bonneville") to develop the Columbia River Hydroelectric System. Bonneville delivers power to public and private utilities throughout the Northwest by means of a large integrated transmission grid.

Under federal law, municipalities, public utility districts ("PUDs"), and rural electric cooperatives are entitled to preferential treatment in purchasing power from Bonneville. 16

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1. Brown, *Whoops: Darkness to Dawn*, Washingon Post, Dec. 2, 1984, at 1, col. 2.

U.S.C. §§ 832c, 825s (1974). These public or consumer-owned utilities are called "preference customers" and have priority to receive available power over other customers of Bonneville.[2] Bonneville also sells power to privately owned utilities, known as "investor-owned utilities," and private industries purchasing large quantities of electricity directly from Bonneville, sometimes called "direct service industries."

In addition to their preference rights, smaller preference customers have power sales contracts with Bonneville that guarantee up to 25 megawatts of electricity from the pool of power available from Bonneville. This so-called "25-megawatt umbrella" was intended to provide substantial protection to small consumer-owned utilities who could not feasibly generate their own power.

In the 1960's, Bonneville began to forecast that the region's hydroelectric resources would be exhausted by the early 1980's. Consequently, the Ten-year Hydrothermal Power Program, developed in 1968 under Bonneville's leadership, called for the construction of several nuclear and other thermal power plants during the 1970's for commercial operation commencing in the 1980's.

Since Bonneville was itself not authorized to construct or own thermal generating plants, the Supply System commenced construction of three nuclear projects in the early 1970's pursuant to "Net Billing Agreements" executed by Bonneville, the Supply System, and numerous public and consumer-owned utilities in the region. Private investor-owned utilities also owned a part of one of those nuclear projects. Under a contract with the Supply System, Bonneville oversaw construction of these three plants.

Through net billing, Bonneville provided financial backing for those projects and thereby obtained additional generating capability for sale to other preference and private customers. Under this arrangement, the Supply System issued tax-exempt

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2. Although rural electric cooperatives are legally organized as private corporations under certain business and corporation statutes of their respective states, they are nevertheless regarded as preference customers under federal law so long as they qualify as non-profit organizations. *See* 16 U.S.C. § 832b (1974).

municipal bonds to finance construction of the nuclear plants and sold shares of the plants' generating capability to "participants" in those projects, who were also preference customers of Bonneville. Those participants then assigned their shares of project capability in Projects 1, 2, and 3 to Bonneville in exchange for "credits" applied to their power purchase accounts with Bonneville. Since Bonneville was obligated to give credits for amounts paid by participants to the Supply System whether or not those projects generated power, Bonneville effectively assumed the "dry-hole risk." The cost to Bonneville of allowing credits for nuclear project capability assigned to it by the participants was melded into Bonneville's rate base and thereby spread throughout the region to many of its public and private customers. Essentially, the net-billing mechanism allowed Bonneville to obtain additional electricity for its Pacific Northwest transmission system without running afoul of its legal inability to acquire a direct ownership interest in thermal generating plants.[3]

By the mid-1970's, Bonneville projected sufficient growth in regional demand for electricity to require construction of additional thermal generating plants. For several reasons, however, Bonneville was unable to employ the net-billing mechanism for additional plants.[4] Bonneville therefore unveiled Phase II of the Hydrothermal Power Program, which called for the construction of additional thermal generating plants by the Supply System under a different arrangement.

The early drafts of agreements for participation in Supply System Projects 4 and 5 (hereinafter sometimes referred to as the "Projects") went through several transformations. Some drafts involved Bonneville in a "trust-agent" capacity. Since

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3. The validity of the Net Billing Agreements was upheld in *City of Springfield v. Washington Public Power Supply System*, Nos. 83-3927, 83-4024, slip. op. (9th Cir. Feb. 4, 1985).

4. Two reasons are commonly cited for discontinuation of the net-billing mechanism. First, a ruling of the Internal Revenue Service disallowed the issuance of tax-exempt bonds for any additional projects if a substantial percentage of the output of those projects was to be sold to non-exempt entities. Second, because the cost of nuclear power was higher than the cost of hydroelectric power, there were practical limits to the amount of net-billing credits that could be applied to Bonneville accounts.

power from these Projects would also be sold to large aluminum and chemical companies, other proposals explored the participation of Bonneville's industrial customers in the contractual arrangement. Ultimately, because of difficulties with those proposals and the perceived urgency to begin construction in order to forestall energy shortages projected to occur as early as 1983, Bonneville distributed the Participants' Agreement in its present form only to its preference customers and urged their participation.

Like its predecessor agreements, the Participants' Agreement involved a complex arrangement for constructing and financing the Supply System Projects. Each participant purchased a "participant's share" of the "project capability" or output of the Projects. In exchange, each participant was obligated to pay its participant's share of the annual budget prepared by the Supply System to cover the costs associated with construction and operation of the Projects. The Agreement included so-called "take-or-pay" and "hell-or-high-water" clauses which, as understood by the Nine Respondents, imposed payment obligations on participants, so long as the contract was valid, whether or not the Projects actually produced power and whether or not the participants had a current need for the power.

Until this time, utilities dependent on Bonneville to supply all of their power had normally been obligated to pay only for whatever power they needed or used. Even the Net Billing Agreements for Projects 1, 2, and 3 had provided such protection through net billing credits. Consequently, small utilities that projected no immediate need to acquire additional commitments of power were wary of obligating themselves to purchase the full amount of their share of the Projects' output without some assurance that output in excess of their individual requirements could be assigned to other utilities or industries that needed the power. To accomplish this redistribution, an Assignment Agreement was drawn up to accompany the Participants' Agreement. Under the Assignment Agreement, each participant could assign to the Supply System all or part of its share of project capability for a period of approximately ten years according to a schedule submitted to the Supply System on an annual basis. That energy would then be distributed by the Supply System to other public utilities, to Bonneville, or to

certain industrial customers of Bonneville that agreed to purchase power from the Projects.

Even with this mechanism for redistribution, many small preference customers with loads well under the 25 megawatt guarantee still believed and informed Bonneville that they did not perceive a need to participate in the Projects. They reasoned that the statutory preference and 25-megawatt umbrella provided them with sufficient protection from future shortages or curtailment by Bonneville.

To meet the resistance of its smaller preference customers, Bonneville informed those utilities that they needed to sign the Participants' Agreement in order to obtain additional generating capacity for the entire region. Bonneville suggested that it needed the participation of preference customers to demonstrate broad regional support for additional power plants and enhance the prospects of legislation authorizing Bonneville to participate directly in thermal generating facilities. Bonneville strongly encouraged utilities to sign the Agreement regardless of their individual circumstances and despite the protection otherwise afforded them by their preference rights and the 25-megawatt umbrella. In fact, Bonneville warned the smaller utilities that even if they did not project future needs beyond the 25 megawatt guarantee, they would nevertheless share in and experience the same shortages and curtailments facing the larger public and private utilities in the region. This mutual interdependence of utilities sharing Bonneville's transmission grid was captured in Bonneville's "one short, all short" theme—a powerful tool in inducing preference customers to subscribe to the Projects.

Further inducement to persuade the preference customers to sign the Participants' Agreement came with a "notice of insufficiency" issued by Bonneville only several weeks before the Agreement was circulated for consideration and signature. The notice of insufficiency warned all preference customers of a projected power shortage commencing July 1, 1983. In effect, participants were told that they would be short of energy without the Projects. Bonneville's notice of insufficiency also warned that as of July 1983, it would be unable to fulfill its contractual obligations to preference customers, including the

25 megawatt guarantee, unless those preference customers assisted Bonneville in acquiring additional generation capability for the region by signing the Participants' Agreement.

Under those circumstances, without any reasonable alternative source of power, 88 preference customers signed the Participants' Agreement in order to assure future power supply for the entire region. They believed, as Bonneville had told them, that "we are all in this together." Eighty-seven of the 88 participants also executed the Assignment Agreement and thereby assigned most of their share of the Projects' output during the first years of anticipated operation to other utilities and private industrial customers in the Northwest. Forty-three of the 88 participants anticipated surplus project capability for assignment to other utilities as far into the future as 1992. Based upon those projections, power from the Projects was committed for resale to private aluminum and chemical companies in the region.

The petitioners' allegation that participants entered the Participants' Agreement to obtain electrical power at cost solely for the benefit of their constituencies is unfair and misleading. Instead, many participants entered the Participants' Agreement not to satisfy any immediate need for their own constituencies, but rather to assist other public and private utilities throughout the region to obtain adequate power.

The petitioners also mislead this Court by suggesting that participants controlled the destiny of the Projects. Although the Participants' Agreement established a committee of participant representatives to monitor the Supply System's construction and management of the Projects, the powers of the committee were extremely limited. Among other things, the "Participants' Committee," consisting of only seven part-time volunteer laypersons, was authorized to review only certain Supply System actions. Affirmative approval by the committee was not required for Supply System proposals; instead, they were deemed approved unless the Supply System received a formal disapproval from the committee within 15 days of delivering its proposal. The Participants' Committee had no means of implementing its own recommendations without the approval of the Supply System or an outside arbitrator. Moreover, even when

the committee disapproved a Supply System proposal, it could merely force the proposal to be reviewed by an arbitrator in accordance with a standard of "prudent utility practice." Any Supply System proposal that satisfied the prudent utility practice standard could automatically be implemented, despite disapproval or objection by the Participants' Committee.

Commencing in 1977, the Supply System issued $2.25 billion in bonds to finance construction of the Projects. Unfortunately, events did not occur as Bonneville and the Supply System had anticipated. Economic recession, especially acute in the Pacific Northwest, flattened the growth in power demand that Bonneville had forecasted. Increasingly strict regulations of the Nuclear Regulatory Commission, partially attributable to the accident at Three Mile Island, required substantial redesign and caused significant increases in the costs of constructing nuclear plants. Strikes and other labor problems slowed the construction of all five Supply System nuclear projects. Finally, conservation and alternative energy resources provided a substantial savings of energy not earlier envisioned by the planners at Bonneville.

By May 1981, the Supply System determined that it could not borrow enough money to continue full-scale construction of the Projects. The majority of participants, still convinced that the Projects would be needed for the region, loaned substantial amounts of money to the Supply System to assist in "mothballing" the Projects. However, the direct service industries, which expected to receive power from the Projects pursuant to the Assignment Agreements, declined to participate in the mothballing program.

By January 22, 1982, the Supply System determined that completion of the Projects was impossible and therefore terminated them, to the dismay of most participants. Many participants then made additional loans to the Supply System to assist in the orderly liquidation of assets of the Projects.[5]

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5. Every one of the Nine Respondents made loans to the Supply System in connection with mothballing or termination of the Projects.

The petitioners' statement that participants repudiated their obligations under the Participants' Agreement is unfounded and untrue. None of the Nine Respondents repudiated any lawful obligations under the Participants' Agreement. Certain other participants, charged with public and fiduciary duties of stewardship of their ratepayers' funds, raised specific questions about the interpretation of the Participants' Agreement. Ratepayers also filed actions questioning the authority of certain participants to enter the Participants' Agreement. However, many utilities, including the Nine Respondents, were brought into this litigation involuntarily by the petitioners. Only after certain facts were generated in pre-trial discovery did many utilities even raise questions about the circumstances under which the Agreement was signed.

Moreover, even though important issues were raised in connection with the validity of the Participants' Agreement, a vast majority of the participants demonstrated a good-faith willingness to perform any obligations that they had under the Agreement by depositing payments totalling approximately $34 million in a court-administered escrow during the pendency of the proceedings below. Consequently, the participants, particularly the Nine Respondents, were not "repudiators" of their obligations under the Participants' Agreement, as the petitioners have unfairly alleged.

Proceedings Below

In May 1982, petitioner Chemical Bank filed a declaratory action in the Superior Court of Washington for King County.[6] In that action, Chemical Bank, as trustee for all holders of bonds for Supply System Projects 4 and 5, sought a judgment declaring that participants in the Projects were obligated under the Participants' Agreement to make payments to the Supply System sufficient in amount to pay principal and interest on the revenue bonds issued for those Projects.

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6. Prior to Chemical Bank's action, none of the Nine Respondents was involved in litigation pertaining to the Projects except the City of Milton-Freewater, Oregon, which argued in an action commenced by ratepayers in Oregon that it possessed authority to enter the Participants' Agreement. *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984).

When Chemical Bank and the Supply System moved for summary judgment in the fall of 1982, the trial court interpreted the Participants' Agreement to impose the dry-hole risk upon participants. The trial court also determined that Washington participants had authority to execute the Participants' Agreement. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 3-4 (Super. Ct. King County Nov. 16, 1982) Order on Motions for Summary Judgment (Appendix to Petition for Certiorari at E-3). The trial court subsequently ruled that rural electric cooperatives in several states possessed authority to enter the Participants' Agreement, but deferred to the Idaho Supreme Court and the Oregon Circuit Court, where actions were then pending, to determine whether Idaho and Oregon cities and PUDs possessed authority to enter the Participants' Agreement. Certain participants then sought direct and accelerated review by the Washington Supreme Court of the trial court's order, and the Washington Supreme Court granted such review.

On June 15, 1983, the Washington Supreme Court reversed the trial court and held that the Participants' Agreement was *ultra vires* and beyond the powers specifically granted to Washington cities and PUDs. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 666 P.2d 329 (1983) (hereinafter cited as *Chemical Bank I*) (Appendix B to Petition for Certiorari). After reviewing statutes that granted to Washington cities and PUDs the powers to purchase electricity, acquire electric generating facilities, and participate in joint operating agreements, the court determined that those statutes did not authorize execution of the Participants' Agreement, which imposed upon participants a dry-hole obligation without affording them the requisite accompanying rights of ownership or control over the Projects. 99 Wash. 2d at 782-91 (Appendix to Petition for Certiorari at B-10-18).

The *Chemical Bank I* opinion left a gaping hole in the Participants' Agreement. The Agreement had been declared *ultra vires* as to Washington cities, towns, and PUDs that held 70% of the participants' shares in the Projects. Upon return of the case to the trial court for further proceedings consistent with the *Chemical Bank I* opinion, the trial court determined on motions for summary judgment filed by the remaining participants that

under state contract law the Participants' Agreement was therefore invalid and unenforceable against all remaining participants by reason of (a) contract indivisibility and the failure of the condition of substantially 100% participation in the Projects, (b) mutual mistake as to the authority of Washington PUDs and municipalities to enter into the Agreement, and (c) frustration of purpose and impracticability. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 2-3 (Super. Ct. King County Aug. 11, 1983) Order and Judgment (Appendix to Petition for Certiorari at D-2-3). The trial court also declared that Chemical Bank and the Supply System could not circumvent the *ultra vires* doctrine and had not demonstrated any basis to impose payment obligations upon the remaining participants under state law theories of waiver, estoppel, laches, ratification, restitution, unjust enrichment, Article 8 of the Uniform Commercial Code, or alleged control by the participants. *Id.* Finally, on motions for reconsideration filed by the petitioners herein, the trial court determined that neither the state nor federal constitution had been violated in this proceeding. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, slip. op. at 2 (Super. Ct. King County Sept. 16, 1983) Order Denying Motion for Reconsideration of Order and Judgment (Appendix to Petition for Certiorari at C-2).

Chemical Bank and the Supply System then sought reconsideration of the *Chemical Bank I* opinion, as well as review of the subsequent trial court determination that the Participants' Agreement was unenforceable against all remaining participants. After extensive briefing and oral argument, the Washington Supreme Court affirmed its prior decision in *Chemical Bank I* and upheld the Order and Judgment entered by the trial court. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) (hereinafter cited as *Chemical Bank II*) (Appendix A to Petition for Certiorari). The Washington Supreme Court also determined that there had been no taking of property without just compensation, no impairment of contract, and no denial of due process under the federal and state constitutions.

Related Litigation

The termination of Supply System Projects 4 and 5 has generated a substantial amount of litigation of which this Court should be aware in considering this petition for certiorari.

Validity of the Participants' Agreement

Ratepayers in several states commenced actions to determine the validity of the Participants' Agreement executed by their utilities. In *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G to Petition for Certiorari), the Oregon Supreme Court reversed the trial court and determined that Oregon municipalities were empowered to enter the Participants' Agreement under the statutes and constitution of the State of Oregon.

In *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I to Petition for Certiorari), *cert. denied*, 105 S. Ct. 219 (1984), the Idaho Supreme Court determined that Idaho municipalities lacked authority under the Idaho Constitution to enter the Participants' Agreement and declared the Agreement void and *ultra vires* as against five Idaho municipalities. Petitioners in the instant case also sought a writ of certiorari in the *Asson* case on constitutional grounds almost identical to those raised here. This Court denied that petition.

Finally, the Supreme Court of Wyoming also considered the validity and enforceability of the Participants' Agreement against two electric cooperatives in Wyoming. The Wyoming Public Service Commission had prohibited those cooperatives from making payments under the Participants' Agreement because the Agreement had not been approved by the Commission. The Commission also found that the dry-hole provisions of the Agreement violated the Wyoming requirement that utility rates may include only the costs of facilities that are in fact "used or useful" to the public. Upon appeal, because the Wyoming Supreme Court agreed with the Washington Supreme Court that the lack of authority of Washington municipal participants rendered the Agreement invalid and unenforceable against all remaining participants, it determined that appeal of the Wyoming Public Service Commission's determination was moot. *Pacific Power & Light Co. v. Public Service Commission*, 677 P.2d 799 (Wyo.) (Appendix to Petition for Certiorari at

H-10), *cert. denied*, 105 S. Ct. 120 (1984).

Role of Bonneville

Also related to this litigation are two lawsuits filed in the United States Court of Claims by a number of participants in Projects 4 and 5 against Bonneville for breach of duties imposed upon it under federal law and under its power sales contracts. *Benton County Public Utility District No. 1 v. United States*, Nos. 590-82C, 514-83C (Ct. Cl. filed Nov. 15, 1982); *Public Utility District No. 1 of Clallam County v. United States*, No. 29-83C (Ct. Cl. filed Jan. 17, 1983). Specifically, the plaintiffs allege that Bonneville's actions undertaken to seduce utilities to sign the Participants' Agreement constitute a breach of its statutory and contract obligations to provide preferential treatment to public utilities that qualify as preference customers.

Bond Purchasers' Actions for Fraud

The most significant related litigation is a group of lawsuits filed in federal and state courts by Chemical Bank and purchasers of Project 4 and 5 bonds against the Supply System, the Supply System's directors, the Supply System's bond counsel, the Supply System's financial advisor and accounting firm, the Supply System's engineering and project consultants, the Supply System's managing underwriters, the participants and members of the Participants' Committee, and Bonneville. The Judicial Panel for Multi-District Litigation consolidated approximately two dozen class action lawsuits against these defendants in the United States District Court for the Western District of Washington for litigation of claims based upon the anti-fraud provisions of the federal and state securities laws, common law fraud, misrepresentation, negligence, and other theories of tort. *In re Washington Public Power Supply System Securities Litigation*, M.D.L. No. 551 (W.D. Wash. consolidated Aug. 5, 1983) (hereinafter the "multidistrict litigation"). A class of persons and entities that purchased bonds from March 1, 1977 through January 22, 1982 was conditionally certified for prosecution of the federal securities fraud claims more than a year ago. *Id.*, Order at 3 (Nov. 30, 1983). Almost 100 million pages of documents have been produced during the past two years and depositions on multiple tracks commenced in January of this year.

As an adjunct to the multidistrict litigation, Chemical Bank, as trustee on behalf of all current holders of Project 4 and 5 bonds, filed a similar action alleging almost identical claims. *Chemical Bank v. Public Utility District No. 1 of Benton County*, No. C83-1080 (W.D. Wash. filed Aug. 3, 1983). In addition, M.G.I.C. Indemnity Corporation, which issued loss insurance to a substantial number of investors in Project 4 and 5 bonds, has filed a virtually identical action. *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County*, No. C84-690 (W.D. Wash. filed May 23, 1984). The Chemical Bank and M.G.I.C. cases are proceeding on the same schedule and under the same judge as the multidistrict litigation.

Finally, a group of bondholders who purchased almost one-quarter of the outstanding principal amount of Project 4 and 5 bonds has filed a similar action in the Superior Court of the State of Washington for King County alleging claims against most of the defendants identified above based on reformation of the Participants' Agreement, estoppel, restitution, the Washington State Securities Act, negligence, malpractice and other legal theories. *Haberman v. Washington Public Power Supply System*, No. 84-2-06452-8 (Super. Ct. King County filed May 7, 1984).

This Court should not be misled by the petitioners' casual reference to this securities litigation. It is probably the largest securities and fraud litigation ever pursued. Indeed, it is the proper forum for petitioners to test their allegations of "repudiation."

REASONS FOR DENYING THE WRIT

This Court has reserved its discretionary jurisdiction for issues of great public importance, beyond the academic or episodic, and in which the constitutional issues have been clearly drawn in the courts below. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955). None of those factors is present here. Indeed, this case does not even raise a substantial constitutional question.

Investors in bonds issued for the Projects have been disappointed by an unanticipated interpretation of pre-existing state

law that has diminished the return on their investment. Their remedy against the respondents, if any, lies in various securities acts and in tort. Indeed, they are actively pursuing those claims in federal district court. Whatever the outcome of that related litigation, there has been no taking of property without just compensation, and there has been no violation of due process in this proceeding. This case turns completely on interpretation by state courts of state enabling statutes and contract rights. It involves no constitutional question.

1. *No Question Arises Under the Takings Clause.*

This case does not involve a question of taking. Whether a taking has occurred depends largely upon the particular circumstances in each case. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). This Court has identified several considerations that have particular significance in making the ad hoc, factual inquiry that is needed to determine whether a compensable taking has occurred. *Id.* at 124-25. However, before engaging in that inquiry, a court must look for the existence of a legitimate property interest and a governmental appropriation of that property for public use. Neither is present in this case.

Obligations arising under *valid* and *enforceable* contracts may be property within the meaning of the takings clause. *Lynch v. United States*, 292 U.S. 571 (1934). *See also Armstrong v. United States*, 364 U.S. 40 (1960). However, "[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) *(quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See also United States v. Causby*, 328 U.S. 256, 266 (1946) (the meaning of "property," as used in the Fifth Amendment, "will normally obtain its content by reference to local law") (citation omitted).

The Washington Supreme Court determined that under state law the Participants' Agreement is not a valid contract. That being so, neither the Supply System nor the present holders of its bonds have a cognizable Fifth Amendment property right in the Agreement. Instead, the bondholders have only a unilateral

expectation that the Participants' Agreement should be performed. "But a mere unilateral expectation . . . is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Nor has there been any governmental appropriation for public use. The petitioners conjure up an image of conspiracy among the participants and the Washington Supreme Court. They sprinkle references to "the governmental participants" among their repeated allegations that participants repudiated their obligations and thereby appropriated bondholder's property. But the participants do not comprise a government. Although some are municipal corporations from several states, the others are private, albeit consumer-owned, corporations organized under various business and corporation statutes of five different states. Moreover, the involvement of the 88 participants in litigation that results in invalidation of a contract is simply not governmental exaction of property for public use.[7]

The only governmental action involved in this case was judicial interpretation of a pre-existing state statute. No legislation or regulations were enacted to exact a forced contribution to municipal revenue. Instead, a statute that existed prior to the bondholders' investment was interpreted in a manner which they had not expected.

(a) *There Has Been No Interference With Reasonable Investment-Backed Expectations.*

Even if there had been governmental interference with a cognizable property right, the bond purchasers would not be entitled to compensation for that interference under the factors identified by this Court to assist in determining whether compensation is due. First, " '[a] reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862,

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7. This is even more obvious in light of the many different positions taken by the 88 participants in state court with respect to various issues concerning the Participants' Agreement. The participants are by no means a homogenous single-minded group.

2875 (1984) (*quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Here, institutions and persons who purchased Supply System bonds in order to obtain their high tax-exempt yields knowingly assumed an investment risk.[8] The bond purchasers' "investment-backed expectations" were specifically qualified by written statements and opinions both on the bonds themselves, and on the accompanying investment prospectus. Those opinions warned that bondholders' rights were subject to "judicial discretion," "principles of equity," and "exercise of the sovereign police powers of the State of Washington."[9]

Moreover, many bond purchasers were actually aware of the investment risk. For example, a class representative in the multidistrict securities litigation testified that she knew that her investment involved risk; indeed, she even acknowledged that she was willing to take a higher risk in order to obtain the higher yields offered by Supply System bonds.[10] Some investors even decided to obtain insurance against any loss caused by realization of the risk.[11] Clearly, many purchasers of bonds on whose

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8. Petitioners admit that bondholders assumed certain risks such as the insolvency of the participants. Petition for Certiorari at 7. However, they decline to identify the other risks inherent in debt securities which the bondholders knowingly and voluntarily assumed.

9. The Official Statements issued in connection with each issue of bonds prior to the 1979B series included legal opinions that warned that "the obligations of the parties to said Participants' Agreement . . . and the enforceability thereof under the same may be subject to general principles of equity which permit the exercise of judicial discretion and to valid bankruptcy, insolvency, reorganization, moratorium and other laws for the relief of debtors." 1979A Official Statement at E-3.

Commencing with the Official Statement for the 1979B series, bond purchasers were warned that enforceability of the Participants' Agreement was subject to "judicial discretion, the valid exercise of sovereign police powers of the State of Washington, and of the constitutional powers of the United States of America, and valid bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors' rights." 1979B Official Statement at D-3.

Moreover, the same warning, applied to "the rights of the holders of said bonds," appeared on the bonds themselves. Series 1980E $5,000 bond, 11.75% due July 1, 2010, CUSIP 939821 LC6.

10. The pertinent excerpt of that testimony is reprinted in Appendix A to this brief.

11. The M.G.I.C. action, described above, was commenced by a major investment insurer that insured the bonds of some purchasers.

behalf petitioners seek this petition were fully aware of the risks inherent with their investment.[12]

Furthermore, the reasonable investment-backed expectations of purchasers of bonds are necessarily encumbered with the risks inherent in any investment security, including the issuer's ability to transact business, enforce contracts, and pay its obligations. Laws that exist when a contract is formed become a part of that contract, as if they were expressly incorporated in its terms. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *Cross Lake Shooting and Fishing Club v. Louisiana*, 224 U.S. 632 (1912); *Minish v. Hanson*, 64 Wash. 2d 113, 390 P.2d 704 (1964). Hence, the obligation of a contract cannot be impaired by laws in force when the contract was made, because it is presumed that the contract was made in contemplation of these existing laws. *Minish*, 64 Wash. 2d at 115, 390 P.2d at 705. Furthermore, "private parties dealing with a government agency are charged with knowledge of the agency's authority." *Noel v. Cole*, 98 Wash. 2d 375, 379, 655 P.2d 245, 248 (1982). *See also* 10 E. McQuillin, *The Law of Municipal Corporations* § 29.104c (3d ed. 1981) ("[N]otice [is] imputed to all persons dealing with a municipal corporation of the limits of its powers . . .").

This Court has long applied this rule to purchasers of municipal bonds:

> We may repeat here what was said in *Anthony v. Jasper Co.*, 101 U.S. 697, that purchasers of municipal bonds 'are charged with notice of the laws of the state granting power to make the bonds that they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created.'

Northern National Bank v. Trustees of Porter Township, 110 U.S. 608, 618 (1884). *Accord Moore v. City of Nampa*, 276 U.S. 536,

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12. As trustee for the bondholders, Chemical Bank represents persons who purchased after challenges to the Participants' Agreement were made and even after the Agreement was adjudged invalid. Surely those investors cannot make a credible claim that their property was taken. Indeed, such a determination would result in millions of dollars of windfall profits for speculators who continue to trade in bonds for the Projects.

541 (1928); *Barnett v. City of Denison*, 145 U.S. 135, 139 (1892); *Merchants Exchange National Bank v. Board of Chosen Free Holders*, 115 U.S. 384, 390 (1885). Professor Williston has also summarized the rule:

> Holders of municipal bonds are held in law to know, and are chargeable with constructive knowledge of, constitutional and statutory provisions bearing on the authority to issue bonds. Therefore, though negotiable in form, such bonds are subject to certain defenses, as for instance that the issue is *ultra vires* and therefore void even in the hands of an innocent purchaser.

1 *Williston On Contracts* § 220B (3d ed. 1957).[13]

In this case, the bond purchasers are not entitled to compensation because their property rights were subject to an investment risk which they are charged by law to bear, and which they knowingly assumed. The Constitution does not guarantee that investment risks will not materialize into investment losses.

(b) *There Has Been No Governmental Action Characteristic Of Taking.*

Analysis of the second factor identified by this Court—the character of the governmental action—also suggests that compensation is not required. The only governmental action involved in this case is judicial interpretation of a pre-existing law. The Washington Supreme Court decision did not transform bondholders' investment expectations into public property. Instead, that court merely interpreted state statutes which

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13. In *Washington v. Maricopa County*, 152 F.2d 556 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1946), the State of Washington had purchased municipal bonds issued by Maricopa County, Arizona. Pursuant to a statute requiring the county to recall and reissue bonds if interest rates dropped substantially, Maricopa County called the bonds prior to the maturity date stated on the face of the bonds. When the State of Washington claimed that Maricopa County was obligated to pay interest on the bonds at the agreed rate until maturity, the federal district court rejected that claim. In affirming that judgment, the Ninth Circuit Court of Appeals stated:

> [P]urchasers of municipal bonds are bound, at their peril, to take notice of the existence and terms of the law from which it is claimed the power to issue them is derived .... *At bottom the estoppel argument is that appellants were misled because some of the statutes referred to in the bonds were subsequently construed in a manner different from that in which appellants think they should be construed. That, however, is a peril which the purchaser necessarily assumes* ...

Id. at 561 (citations omitted) (emphasis added).

circumscribe authority of municipal corporations, and found that a contract was invalid and *ultra vires* as to those municipal corporations.

Invalidation *ab initio* of *ultra vires* municipal contracts has long been regarded as necessary to protect citizens from government's unlawful or unjust contracts, and to maintain the integrity of a governmental system under which the powers of municipal corporations are limited to those directly conferred by the legislature. *See Noel v. Cole*, 98 Wash. 2d 375, 378, 655 P.2d 245, 248 (1982). The decision below was not a physical invasion by government to exact a forced contribution. Rather, it was merely judicial interpretation of the limitations imposed upon government in order to "[adjust] the benefits and burdens of economic life to promote the common good." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. . . . 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'") *(quoting Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

Moreover, this Court has acknowledged that a state "might properly make 'a choice between the preservation of one class of property and that of the other'" and does not exceed "its constitutional powers by deciding upon the destruction of one class of property [without compensation] in order to save another which, in the judgment of the legislature, is of greater value to the public." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 126 (1978) (brackets original) *(quoting Miller v. Schoene*, 276 U.S. 272, 279 (1928)). Consequently, in interpreting the state statutes that circumscribe authority of municipal corporations, the Washington Supreme Court was entitled to give effect to the legitimate state policy of protecting citizens subject to the governance of municipal corporations from ill advised or *ultra vires* contracts, even if advancement of that policy would have an impact on private parties who not only were charged with knowing the limits of municipal author-

ity but also willingly undertook that investment risk.

(c) *The Extent of Diminution in Value is Uncertain.*

Even the third factor identified by this Court—the extent of diminution in value—is still unresolved in this case. Although the Participants' Agreement has been declared invalid, bond purchasers still retain the contract rights embodied in the bonds themselves. In fact, in the multidistrict litigation, bond purchasers are suing the Supply System on those bonds, and their attorneys have publicly stated their intent to pursue all assets of the Supply System, including Projects 1, 2, and 3. Moreover, the bond purchasers' money was not squandered—it was converted into assets, many of which have substantial value. Two large turbine generators and other nuclear generation equipment may bring hundreds of millions of dollars for distribution to the bondholders.[14] Finally, even the pendency of related litigation against the respondents and other defendants leaves open the possibility of future recovery by bond purchasers and could restore the value of their bonds. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 (1977). *See generally Andrus v. Allard*, 444 U.S. 51 (1979).

Finally, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), relied on by the petitioners, simply does not reach this case. This Court expressly restricted its holding to "the narrow circumstances of [that] case," *id.* at 164, where the county clerk retained interest earned on an interpleader fund despite the existence of separate statutes that established creditors' rights to that fund and specifically set the clerk's fee as a percentage of the amount of the fund. In *Webb's*, there was a distinct basis in state law to establish a property right. Here there is none. In *Webb's*, the Florida legislature exacted from a bulk sales purchaser a forced contribution to municipal revenues as a condition of obtaining statutory protection from creditors' claims. Here, the only statute at issue was a municipal enabling statute that was interpreted more narrowly than the bond-

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14. As of June 30, 1984, Chemical Bank held approximately $117,324,000 in several accounts on behalf of the bondholders. Disposition of assets of Projects 4 and 5 continues under Chemical Bank's supervision. Chemical Bank, Bond Fund Trustee, *Report to Bondholders* (Oct. 1984).

holders had anticipated—a risk that bondholders voluntarily assumed when making their investment. *Webb's* involved a court enforcing a legislative enactment that took money for public use. This case involves only a court's interpretation of statutes that impose limits on government.[15]

There is no issue under the Takings Clause. The writ should be denied.

2. *No Question Arises Under the Due Process Clause.*

The due process questions raised by petitioners are also a mirage. Petitioners claim that bondholders were denied due process because the state court retroactively manipulated state law and thereby denied petitioners notice and an opportunity to be heard on critical factual issues. Petitioners also complain that bondholders were denied their right to an impartial tribunal. Neither of these arguments has merit.

First, the decision below was not a retroactive manipulation of state law. In evaluating the authority of municipal corporations to enter into certain joint arrangements, the Washington courts had on prior occasions specifically considered the need for ownership and control. In *Roehl v. Public Utility District No. 1 of Chelan County*, 43 Wash. 2d 214, 261 P.2d 92 (1953), a joint purchase agreement under which five public utility districts acquired some substantial utility properties was upheld against a ratepayer's challenge that the agreement was *ultra vires* and void. The court based its holding in part on its determination

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15. As *amicus curiae*, the Public Securities Association ("Association") attempts to expand the issues on appeal by arguing that the Washington court violated the Contract Clause by effectively implementing a statute enacted after the Participants' Agreement was signed. Brief for the Public Securities Association as *Amicus Curiae* in Support of the Petition at 19. However, the Contract Clause applies only to legislative enactments. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924). A judicial decision enforcing a legislative impairment of contract may be reviewed under the Contract Clause only if the decision "could not withstand judicial analysis independent of the legislation allegedly implemented." *Mariniello v. Shell Oil Co.*, 511 F.2d 853, 859 (3d Cir. 1975). Here, the Association admits that the Washington court did not expressly rely on the statutory provision it alleges was implemented. Indeed, the statute had no application to the particular authority question before the court. The court's decision, therefore, does not present a question cognizable under the Contract Clause.

that under the agreements each public utility district had joint ownership and retained sufficient control and management by means of a joint executive board.

In *Public Utility District No. 1 of Snohomish County v. Taxpayers of Snohomish County*, 78 Wash. 2d 724, 479 P.2d 61 (1971), taxpayers challenged the authority of Snohomish PUD to participate in the construction, operation, and financing of a coal-powered electric generating plant with four investor-owned utilities. Unlike the Participants' Agreement, which gave the Participants' Committee narrow powers of disapproval leading to referral to an arbitrator, this joint participation agreement required affirmative approval by 75% of the ownership interests of the project's yearly operating budget, and unanimous approval for additional capital expenditures.[16] Furthermore, acting as agent to construct and operate the facility, one of the investor-owned utilities was given only those powers necessary for ordinary plant operation. Based upon careful examination of the agreements, the court found that the "ownership interests [of the PUDs] are amply protected by the terms and conditions of the agreement" and that "[m]ajor management decisions are made by all participants, with the public participants having veto power." *Id.* at 727, 728, 479 P.2d at 63. It is clear, therefore, that precedent existed for an inquiry into provisions of the agreement governing control for the purpose of considering whether Washington cities and PUDs possessed authority to enter the Participants' Agreement.

Despite this existing precedent, the petitioners argue that bondholders were unfairly surprised by the ruling below and therefore deprived of notice and an opportunity to be heard on a critical factual inquiry into participants' control over the Projects. The petitioners are clearly wrong on this issue. Whether municipalities possessed authority to enter the Agreement is a question of law—not fact. Determinations of law do not need an evidentiary hearing. Moreover, the petitioners had a full opportunity to present and argue their analysis and interpretation on this question of law.

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16. In the *Snohomish County* case, municipal corporations owned 28% of the project and privately-owned corporations owned 72%.

It is axiomatic that a court must evaluate the authority to enter into a contract as of the time the contract was formed. Even the petitioners asserted below that "in evaluating the authority to enter into a contract with a 'dry-hole' provision . . . authority must be evaluated at the time the contract was formed." Respondents' Brief 2 of 3: Memorandum . . . Re Authority Issues at 42, *Chemical Bank I* (Feb. 14, 1983).[17] The Washington Supreme Court did exactly that. In both of its opinions, it focused its inquiry on the four corners of the Participants' Agreement to determine whether Washington cities and municipalities possessed authority to enter that agreement at the time it was formed:

> *[W]e will examine the present agreement* to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest. In the present case, *several provisions of the agreement* limit the participants' role in management to an extent inconsistent with control of any facilities required or constructed.
>
> . . . .
>
> Here, the municipal and PUD participants were not acquiring or constructing generating facilities as set out in the statutes because *under the agreement* they ceded virtually all of their ownership interests and most of the management responsibilities to WPPSS.
>
> . . . .
>
> Applying the language of the acquisition or construction statutes and the principles derived from the cases construing that language, we do not believe the participants retained sufficient ownership interests or management responsibilities *under this agreement* to constitute acquisition or construction of an electric generating facility.

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17. The petitioners also argued below that "the Agreement must be analyzed as of the time of its execution, . . . not at a later time when the termination contingency occurs. . . . The [participants] would, instead, have the court undertake this analysis retrospectively." *Id.* at 28.

The petitioners have now performed a complete turnaround by asking this Court to view with hindsight the actions of the Participants' Committee after the termination contingency occurred in order to see whether the Committee had sufficient control for the municipalities to have had authority to enter the Agreement.

Chemical Bank I, 99 Wash. 2d at 787, 788, 791, 666 P.2d at 337-338, 339 (Appendix to Petition for Certiorari at B-14, 16, 18) (Emphases added):

> Our reevaluation of the statutory authority question thus leads us once again to the conclusion that the participants' agreement did not grant ownership control as contemplated by this statutory scheme.

Chemical Bank II, 102 Wash. 2d at 894 (Appendix to Petition for Certiorari at A-20).

Moreover, the petitioners themselves conceded that "the language of the agreements is clear" and that "where, as here, both sides moved for summary judgment on interpretation of the agreements, the Superior Court properly ruled on the contract interpretation issue as a matter of law and without considering extrinsic evidence." Respondents' Brief No. 3 of 3: Brief of Chemical Bank Re: Contract Interpretation at 63-65, *Chemical Bank I* (Feb. 14, 1983). They now ask this Court to consider extraneous evidence as to certain provisions in the Participants' Agreement.

Interpretation of the Participants' Agreement, including its provisions for control, is a question of law. *Chemical Bank II*, 102 Wash. 2d at 894 (Appendix to Petition for Certiorari at A-20) (*citing Kelly v. Aetna Casualty & Surety Co.*, 100 Wash. 2d 401, 670 P.2d 267 (1983)). No evidentiary hearing was required to determine a question of law based upon concededly unambiguous provisions of the Participants' Agreement and statutes then in effect. All other extraneous evidence that petitioners now present to this Court was and still is irrelevant to the question of authority to enter the Participants' Agreement.

Due process requires a hearing "appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). No single form of procedure is dictated by due process; instead, the guarantee is one of fairness in the process by which rights are determined. *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). Since authority of a municipal corporation to enter an agreement is a legal question to be determined as of the time the agreement is entered, petitioners were not entitled to an evidentiary hearing. Instead, they were given ample opportunity to present their arguments, sup-

ported by whatever affidavits or exhibits were necessary. Indeed, the petitioners fully presented their arguments in the proceedings below.

Finally, the bondholders were not deprived of an impartial tribunal. The overwhelming majority of courts that have considered this issue have determined that the interest of a ratepayer is not a substantial, direct, and pecuniary interest that warrants recusal. *E.g., In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (10th Cir. 1980); *In re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976). In fact, the two federal appellate courts to have considered the issue reversed district judges' decisions to recuse themselves, even though recusal is highly discretionary. *See id.* Being a ratepayer does not entail the type of pecuniary interest that is disqualifying. As the Tenth Circuit Court of Appeals stated in *In re New Mexico Natural Gas Antitrust Litigation*,

> The ratemaking proceedings of public utility commissions throughout the nation are reviewed by the courts in the states involved, where most of the reviewing judges are customers of the telephone, electric, water or gas company; yet there is no suggestion in any cases we have seen that these judges should disqualify themselves.

620 F.2d at 797.[18]

3. *Review of This Case Would Constitutionalize Every Case Involving Municipal Default, Fraud Claims Against Municipal Corporations or Judicial Determinations of Municipal Authority.*

In this case, a state court was asked to determine whether state

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18. The reasoning behind this rule was stated in *Pennsylvania Power & Light Co. v. Gulf Oil Corp.*, 270 Pa. Super. 514, 411 A.2d 1203, 1214 (1979), *cert. denied*, 446 U.S. 966 (1980):

> [T]he proof did not demonstrate that a venireman will immediately get a sum certain but only that a venireman who remains [the utility's] customer may over a period of years receive some benefits in the form of reduced electric rates. This interest, unlike the interest of an employee or shareholder of a corporation, is much like the interest of taxpayers whose taxes might be affected by their judgment as jurors in a case involving the county: 'Too shadowy, indirect, remote and contingent to be within the rule that a man cannot be a judge in his own case.'

(citation omitted).

enabling legislation of cities and public utility districts included a grant of power to enter a complex financing arrangement for the construction and operation of two nuclear generating plants. The court held that the enabling legislation did not include authority to enter such an arrangement, and that the contracts signed by certain Washington municipal participants were *ultra vires* and void *ab initio* under well-established principles of municipal law. Then, with 70% of the contractual undertaking lacking, the court interpreted the contract not to require performance by the remaining 30% of participants' shares.

This case involves only judicial interpretation and application of state law on issues where state law is to be applied. Even if the state court's decisions were wrong, this Court does not sit to correct errors of the state courts in the interpretation of state law. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944); *Sauer v. City of New York*, 206 U.S. 536 (1907).

The petitioners' allegations do not constitute constitutional claims—they are allegations of fraud. Petitioners repeatedly characterize their constitutional claims in terms of "promises," "assurances," and "pledges" by participants who, they allege, "abruptly reversed their prior position" and "repudiated those same assurances." Petition for Certiorari at 3, 4, 6, 8, 16. Stripped of the constitutional rhetoric, the petitioners' claims are clearly based on fraud.[19] Moreover, a remedy for common law and securities fraud is exactly what the bondholders have

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19. The petitioner's taking claim is based upon the misleading premise that the Washington municipal participants "repudiated" their obligations. Likewise, the arguments in various *amicus curiae* briefs rest upon the same allegations of repudiation. *See, e.g.*, Brief *Amicus Curiae* of Salomon Brothers, Inc.; Smith Barney, Harris Upham Co., Incorporated; Prudential-Bache Securities Inc.; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated in Support of the Petition for a Writ of Certiorari at 1 and 7; Brief for the Public Securities Association as *Amicus Curiae* in Support of the Petition at 9; Brief for the American Bankers Association, the New York Clearing House Association and the Securities Industry Association as *Amici Curiae* at 1. There is no support whatsoever in the proceedings below for that allegation and the Nine Respondents vigorously deny that the participants repudiated their obligations under the Participants' Agreement. Such unsupported and argumentative allegations of repudiation do not form the kind of factual basis that this Court normally requires for adjudication of a constitutional issue. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

been pursuing for almost two years in the multidistrict litigation.

If this case involves a constitutional question, it is hard to imagine a case that does not. Granting a writ to review this case would implicate the Fifth Amendment in every case involving a municipal securities default or a claim of fraud against a municipal defendant. Granting a writ would inject taking and due process questions into every limiting interpretation of municipal enabling legislation. Review of this case would constitute a serious attack on doctrines of municipal law that place limits on government to protect its citizenry. Review of this case could even constitutionalize every determination of law made by a state court on the basis of unambiguous provisions of a contract, simply because it did not follow an evidentiary hearing on extraneous matters.

CONCLUSION

Litigation over the termination of Supply System Projects 4 and 5 will undoubtedly occupy many hours of judicial time in state and federal courts across the nation. The bondholders on whose behalf petitioners file this Petition are vigorously pursuing their claims based upon fraud and negligence against respondents and other defendants. Indeed, this Court may have another opportunity to consider the petitioners' allegations within the context of other federal claims being pursued by the bondholders.

This Court should not, however, accept review of this case. No substantial constitutional issues are present, and granting review would signal a dramatic departure from the limits of constitutional jurisprudence carefully defined by this Court in the past.

For these reasons, the Nine Respondents respectfully request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

Deposition Testimony of Rosalyn Mirotznik
Plaintiff and Class Representative
Given on January 28 and January 29, 1985

In re Washington Public Power Supply System Securities Litigation,
M.D.L. No. 551 (W.D. Wash.)

. . . .

Q. Am I right in reading these two documents as representing that on November 8, 1982 you sold a New York City General Obligation bond referenced in transaction number 38290—

A. Yes.

Q. —and you purchased a Washington Public Power Supply System Project 4 and 5 revenue bond on the same date?

A. Right.

Q. Am I right?

A. Right.

Q. Now, take a look at the yield of the New York City bond which you sold.

What is that yield?

A. 11.116 percent.

Q. What is the yield of the WPPSS bond that you bought the same day?

A. 15.500 percent.

Q. You were, of course, aware of what the yields of the two instruments were on the date of these transactions, were you not?

A. Yes.

Q. Now, what does it mean to you that the WPPSS bond had a yield which was more than 4 percentage points higher than the New York City bond?

MR. STIEFEL: Objection

Go ahead.

A. Well, I would say that at this date, when I bought this and I sold—when I sold the New York City and I bought the Washington, the higher percent reflects the fact that this was getting, I guess, a little more risky.

Q. Do you believe in your own mind that the higher the yield of a security, the higher the risk of that security?

MR. STIEFEL: Objection.

Answer.

A. Probably.

Q. Would you say in most cases that's true?

A. Probably.

. . . .

Transcript at 141-143.

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No. 84-1258

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1
OF BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Washington Supreme Court

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BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Takings Clause requires a state supreme court to interpret state statutes and an unambiguous contract in conformity with the expectations of the bondholders?

2. Whether the Due Process Clause prohibits a state court from determining as matters of law the interpretation of the terms of an unambiguous contract and the availability of certain equitable remedies?

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On Petition for a Writ of Certiorari to the Washington Supreme Court

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BRIEF OF PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, IN OPPOSITION

Respondent Public Utility District No. 1 of Snohomish County, Washington ("District"), respectfully prays that the Court deny the Petition for a Writ of Certiorari ("Petition") to the Washington Supreme Court submitted by Chemical Bank and the Washington Public Power Supply System ("Supply System").

OPINIONS BELOW

The District accepts the statement of the proceedings below at pages 1-2 of the Petition.

STATEMENT OF THE CASE

Introduction

This case arises out of the default of the Supply System on municipal bonds which it issued to finance the construction of two nuclear power plants known as Projects 4 and 5 ("Projects"). Chemical Bank, as trustee for the Projects' bondholders, brought a declaratory judgment action to determine the validity of the contractual obligations between the Supply System and all the participants in the Projects.

This action posed a unique question of statutory interpretation not previously passed upon by the Washington Supreme Court: Do the Washington statutes, which created and empowered municipal utilities, authorize them to execute resource acquisition contracts containing an unconditional payment obligation, but without ownership rights or their equivalent? After exhaustive briefing, two hearings and extended oral argument covering every conceivable theory, the Washington Supreme Court concluded that as a matter of state law, Washington municipal utilities were not so empowered, and that such a contract was substantively *ultra vires*. This decision was based upon state law, interpreted a contract which all parties conceded was clear and unambiguous, and was rendered in the normal course of a judicial proceeding.

Background

The utilities in the Pacific Northwest have traditionally relied upon electric energy produced by the region's hydroelectric generating resources, which is distributed primarily by the Bonneville Power Administration ("Bonneville"), a federal power marketing agency. All of the public utility participants in the Projects depended upon power purchased from Bonneville to meet some or all of their customers' needs.

During the 1960's, the region experienced a period of sustained and substantial growth. Power demand fore-

casts prepared by Bonneville and others predicted that by the early 1980's, the region's hydroelectric resources would be unable to meet projected needs. These predictions were underscored by the termination of Bonneville's power supply contracts with the region's investor owned utilities due to projected shortages. Public utilities were warned that unless resources were built, there would not be sufficient power to meet their customers' needs.

Under Bonneville's leadership, a plan was formulated to deal with this predicted power deficit. It called for the construction of a large number of thermal generating projects. Individual utilities were incapable of sponsoring these thermal projects, due to their high capital costs. The Supply System was identified as an organization which could finance and construct a number of large nuclear plants, since it had prior resource construction experience, and was a separate municipal corporation with the authority to issue bonds in its own name.

The Supply System initiated the regional construction program by executing "Net Billing Agreements" with public and investor owned utilities, and Bonneville for participation in Projects 1, 2 and 3. These agreements contained the net billing financing mechanism which provided the participating utility with a credit against their payment obligation equal to their Bonneville power bill. This arrangement provided a Bonneville guarantee for the payment of the bonds for these projects. The Supply System issued bonds in its own name and began construction of these plants.

While Projects 1, 2 and 3 were under construction, Bonneville informally advised its public utility customers that unless additional generating resources were built, it would invoke its contractual right to ration energy deliveries. This prompted regional utilities to search for an alternate financing mechanism for additional plants, since a Treasury ruling had made the net billing mechanism unavailable.

This search became urgent in June, 1976, when Bonneville issued its Notice of Insufficiency. This action gave Bonneville the contractual right to ration energy deliveries to its public utility customers. At this time, drafts of the Participants' Agreement ("Agreement") for the Projects were being circulated. With the Notice of Insufficiency, the Agreement was focused upon as the only readily available financing scheme for the two additional nuclear plants purportedly needed to avoid energy rationing and curtailment.

In this energy crisis climate, and at the urging of Bonneville, 88 of the region's public utilities executed the Agreement with the Supply System. The Agreement imposed an unconditional payment obligation in exchange for a conditional right to receive power. Upon execution of these Agreements, the Supply System issued bonds in its own name and commenced construction of the Projects.

This history of these Projects is a chronicle of the problems which beset the nuclear construction industry. Original cost estimates and construction schedules turned out to be grossly in error. Construction delays due to Nuclear Regulatory Commission ("NRC") regulation changes and labor problems, combined with double digit inflation and spiraling interest costs, caused the financing demands to increase dramatically. Further, the predicted energy deficit failed to appear, as demand for electricity decreased sharply due to a severe national recession, and substantial wholesale electric rate increases.[1]

These factors, which were beyond the control of the participants and the bondholders, resulted in a construction slow down of the Projects. Under these trying circumstances, rather than repudiating their obligations, 66 participants assumed additional financial burdens by lending the Supply System $60 million to preserve the Proj-

[1] Between 1979 and 1984, the wholesale electric rates of the public utility participants in the Projects increased by over 520%.

ects assets, and to retain the NRC licenses. Nevertheless, the demand for electricity remained low, making the need for the Projects questionable, and financing at reasonable rates became impossible to obtain. On January 22, 1982, the Supply System decided to terminate the Projects.

Under the Agreement, the first payment to the Supply System by the Participants was due one year after termination. Had the participants insisted on this contractual right, the lack of cash flow could have lead to an uncontrolled termination of the Projects. Once again, there was no wholesale repudiation by the participants of their obligations. Rather, 42 participants loaned an additional $7.8 million to the Supply System to cover the contractual gap between termination and the first payment required by the Agreement. These loans permitted the orderly termination of the Projects, avoiding a Supply System bankruptcy which would have imperiled the bonds of Projects 1, 2 and 3.[2]

Proceedings Below

In May, 1982, prior to the first participant payment required by the Agreement, Chemical Bank filed a declar-

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[2] To date, the Supply System has refused to repay the $67.8 million which was loaned to it by the various participants. To obtain payment from the Supply System, the participants have filed actions in various superior courts in Washington. See, for example, *Public Utility District No. 1 of Clallam County v. Washington Public Power Supply System*, King County Superior Court Cause No. 83-2-12412-3; *Public Utility District No. 1 of Snohomish County v. Washington Public Power Supply System*, Lewis County Superior Court Cause No. 83-2-00499-1; *Public Utility District No. 1 of Franklin County v. Washington Public Power Supply System*, Benton County Superior Court Cause No. 83-2-00715-9. These and other actions resulted in judgments in favor of the participants. The Supply System sought and obtained review of these judgments in a consolidated appeal to the Washington Supreme Court. *Public Utility District No. 1 of Lewis County, et al. v. Washington Public Power Supply System*, Cause No. 50238-2. Oral argument was heard March 20, 1985, and a final decision is pending.

atory judgment action in the Superior Court of King County, Washington, seeking a declaration that the Agreement was valid and binding, and that the unconditional payment obligation was enforceable against all participants. On July 20, 1982, Chemical Bank and the Supply System moved for summary judgment, alleging that there were no disputed material facts, that the Agreement was clear and unambiguous, and that as a matter of Washington law the participants had the statutory authority to execute a contract containing an unconditional payment obligation. The trial court ruled for Chemical Bank and the Supply System. *Chemical Bank v. Washington Public Power Supply System*, No. 82-2-06840-3, Slip Op. at 3-4 (Super. Ct. King County, Nov. 16, 1982). Order on Motions for Summary Judgment (Appendix E at 3). Expedited appeal to the Washington Supreme Court was sought and obtained.

During the pendency of this matter, rather than repudiate their obligations, the participants requested and the court established an escrow account for the deposit of payments required by the Agreement. Over $27.7 million was deposited into this account during the litigation. In addition, numerous participants, representing over 96% of the Projects shares subscribed by Washington municipal corporations, raised their retail rates to ensure their ability to meet their obligations under the Agreement. These actions were taken in spite of the concerns over the possibility of a rate "death spiral",[3] and serious ratepayer opposition.[4]

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[3] The magnitude of the rate increases suffered by the public utility customers during this period led to serious scholarly consideration of whether these utilities were entering a "death spiral", an economic condition in which costs can never be covered because sales decrease faster than rates can be increased. See, "The Demand for Electricity and the Threat of Utility 'Death Spirals' in the Pacific Northwest," Arlon R. Tussing, presented to the Northwest Public Power Assoc., July 20, 1983.

[4] The District, one of the largest participants in the Projects, raised it retail electric rates on March 23, 1983, to generate reve-

The issue presented on appeal was whether state law permitted public utilities to execute a contract containing an unconditional payment obligation for generating facilities which they did not own, and from which they had only a conditional right to receive electricity. This was the first time this question of state law had been presented to any Washington appellate court. In a comprehensive decision, the Washington Supreme Court reviewed all of the pertinent statutes, and analyzed in detail the provisions of the Agreement. The court concluded that Washington municipal utilities are creatures of statute, possessing only those powers expressly granted to them or necessarily implied. *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 782, 666 P.2d 329 (1983) (Appendix B at 10) ("Chem Bank I"). The court noted that it had previously approved municipal utility participation in contracts containing an unconditional promise to pay, but only when the municipal utility had an actual ownership interest in the project. *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). The court recognized that legal control of a project could be tantamount to ownership, and that the amount of control exercised by the participants was established by the terms of the Agreement. *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14).

After careful review and analysis, the court concluded that as a matter of law the unambiguous terms of the Agreement did not vest the participants with an ownership interest in the plants, nor did it contractually grant them control sufficient to be considered tantamount to ownership. *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14). The court decided that under applicable Washington state law, absent ownership or control tantamount

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nues to meet its obligations under the Partiicpants Agreement. This action was immediately met by a lawsuit, filed by a group of the District's ratepayers, which sought to enjoin this rate increase. See, *Fair Use of Snohomish Energy, et al. v. Commissioners of Snohomish County PUD No. 1, et al.*, No. 83-2-01076-2 (Snohomish County Superior Court, March 23, 1983).

to ownership, municipal utilities lacked the statutory authority to contractually undertake an unconditional payment obligation. The court held the contract to be substantively *ultra vires*, and remanded the matter to the trial court. *Chem Bank I*, 99 Wn.2d at 799 (Appendix B at 37).

On remand, Chemical and the Supply System asserted numerous theories to sustain recovery, including restitution, equitable estoppel and some constitutional claims. Once again, there was extensive briefing and oral argument. Based upon abundant Washington precedent, the trial court concluded that as a matter of law equitable theories were not available to enforce a substantively *ultra vires* contract. *Chemical Bank v. WPPSS*, No. 82-2-06840-3 (Super Ct. King County, August 11, 1983) Order and Judgment. (Appendix D). To do so would strip the public of the protection provided by the *ultra vires* doctrine by holding them financially responsible for unauthorized actions, and render legislative limits on municipal authority functionally meaningless.

As to the remaining participants which were not Washington municipalities, the court considered the issues of mutual mistake and frustration of purpose. After careful consideration and analysis, the trial court concluded that the basic purpose, the very heart of the Agreement, had been frustrated because virtually none of its provisions could function properly with 70% of the participants statutorily barred from the Agreement. Further, after the declaration of default and acceleration, Chemical Bank could seize the Projects' assets. The trial court decided that under these drastically altered circumstances, the entire purpose of the Agreement had been frustrated, and that as a matter of law the remaining participants should be released. *Chemical Bank v. WPPSS*, No. 82-2-06840-3 (Super. Ct. King County, August 11, 1983) Order and Judgment (Appendix D).

On their second appeal to the Washington Supreme Court, Chemical Bank and the Supply System raised and briefed a variety of arguments, including restitution, equitable estoppel, unjust enrichment and a constitutional theory drawing on the Due Process, Contract and Takings Clauses. Once again, each of these issues was analyzed in detail. The Washington Supreme Court concurred with the trial court that Washington law prohibited reliance on equitable estoppel, since such a ruling would functionally eliminate the *ultra vires* doctrine from municipal law. The court also concluded that restitution was inapplicable as a matter of law, because Washington precedent prohibits restitution against a municipal corporation where the contract is substantively, as opposed to procedurally, *ultra vires*. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 910, 691 P.2d 524, 544 (1984). (Appendix A at 37) ("Chem Bank II"). In this case, since the municipal utilities lacked the authority they sought to exercise, the contract was substantively *ultra vires*, rendering restitution unavailable.

The court also addressed the constitutional allegations, which amounted to the assertion that the federal constitution required the Washington Supreme Court to interpret state law in a manner consistent with bondholder expectations. The court concluded that the Contract Clause was not applicable, because no contract came into being. *Chem Bank II*, 102 Wn.2d at 912-13 (Appendix A at 39). The court held that the Due Process Clause cannot be interpreted to prohibit state courts from declaring the law, nor from declaring contracts void when they exceed it. *Id.* As to the Takings Clause, the court noted that the case primarily relied upon by Chemical Bank to support its Takings Clause claim dealt with the use of real property, not a judicial ruling on the nature of state law. *Id.* Chemical Bank and the Supply System cited no case to support the proposition that the judicial resolution of a state law question of first impression violates the Takings Clause merely because it is contrary

to the expectations of one of the litigants. The Court affirmed the decision of the trial court. *Chem Bank II*, 102 Wn.2d at 913 (Appendix A at 39).

RELATED LITIGATION

Chemical Bank, the bondholders, and various insurance carriers are actively pursuing multiple remedies in state and federal litigation. In the United States District Court for the Western District of Washington, three separate actions have been filed: *Chemical Bank v. Public Utility District No. 1 of Benton County, Washington, et al.*, C83-1080 (1983); *In re Washington Public Power Supply System Securities Litigation*, MDL-551 (1983); and *M.G.I.C. Indemnity Corp. v. Public Utility District No. 1 of Benton County, Washington, et al.*, C84-690 (1984). These actions have been consolidated, and they allege violations of federal and state securities laws, negligence, negligent misrepresentations, and common law fraud. In addition to the participants in the Projects, the Supply System, and its Board of Directors, these suits also name as defendants the experts upon whom the bondholders allegedly relied.[5] The *Chemical Bank* action is on behalf of all current bondholders, while MDL-551 is a class action on behalf of all individuals, investment and insurance companies which purchased bonds of the Projects from 1977 to January 22, 1982. These matters are well into the discovery process, and a trial date has been scheduled.

Bondholders are also pursuing a variety of remedies in state court actions, including *Haberman, et al., v. Washing-*

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[5] These experts include Blyth Eastman (the Supply System's financial adviser); Merrill, Lynch, Pierce, Fenner and Smith, Salomon Brothers, Smith Barney, and Prudential-Bache (lead underwriters for Project 4 and 5 bond issues); R. W. Beck (consulting engineer); Ebasco Services and United Engineers & Constructors (architects-engineers); Wood & Dawson and Houghton, Cluck, Coughlin & Riley (Supply System bond counsel and special counsel, respectively); and the Bonneville Power Administration.

ton Public Power Supply System, et al., No. 84-2-06452-8 (1984) (Superior Court for King County, Washington) and *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (1984) (Superior Court for King County, Washington). These suits name many of the same defendants as the federal actions, and also Ernst & Whinney, the Supply System's auditor, and the State of Washington. They rely on state securities laws, misrepresentation, negligence and various equitable theories.

These federal and state actions provide Chemical Bank and the bondholders with other forums in which to litigate their alleged negligence, reliance and other claims.

REASONS FOR DENYING THE WRIT

Review will not be granted for judgments of state supreme courts which rest on adequate non-federal grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1954). To afford a basis for review, a substantial federal question must be presented. *Dixon v. Duffy*, 342 U.S. 33 (1951). No substantial federal question is presented where a state court decision can be interpreted as construing a local contract under local law. *Black v. Cutter Laboratories*, 351 U.S. 292 (1956). These principles should be applied in the instant case to deny the requested Writ.

This case presents nothing more novel than a state supreme court declaring the meaning of a state statute, and interpreting the unambiguous terms of a contract between the participants and the Supply System. No abrupt change to well-established precedent took place, only the judicious answer to a question of first impression concerning the statutory authority of municipal corporations.

No substantial federal question has been raised in this matter upon which certiorari can be granted. Petitioners have attempted to manufacture a constitutional claim by alleging a contract repudiation where none occurred,

and by asserting that a state supreme court ruling violates their constitutional rights because it is contrary to their expectations. In essence, Petitioners ask this Court to review and overturn a state supreme court ruling interpreting state law in which no federal question arose. They seek the wrong remedy from the wrong court. Petitioners' remedy lies in state and federal court litigation, rather than attempting to convert their alleged reliance, negligence, and other claims into a substantial federal question.

I. This Decision Does Not Present a Takings Clause Question

The Takings Clause (U.S. Const. Amend. V, cl. 4) is applicable to the states through the operation of the Due Process Clause (U.S. Const. Amend. XIV, § 1, cl. 3). *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The Takings Clause is not read literally to compel compensation for every government action which infringes on a property interest, but depends upon the facts and circumstances of each particular case. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Although the Court has developed formulas and factors which can be used in a variety of situations, there is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). Resolution of Takings Clause questions ". . . ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). To raise a Takings Clause question, something more than the incidental injury to a property interest resulting from the exercise of lawful government authority must be demonstrated. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561 (1906). The complaining party must establish a constitutionally recognized property interest, and demonstrate that it has been taken or appropriated for government

use without compensation. Neither criteria are satisfied in this case.

A. *No Constitutionally Recognized Property Interest Is Involved*

The Court has established that contracts can constitute "property" under the Takings Clause. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897). However, ". . . not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them . . ." are entitled to constitutional protection. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). The Court has been quick to find a constitutionally cognizable property interest when the government has appropriated real property to its own use. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In contrast, the Court has been understandably reluctant to find a property interest in anticipated profits or future earnings.

> . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. . . . Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus v. Allard, 444 U.S. 51, 66 (1979).

In this case, no "property right" cognizable under the Takings Clause was appropriated for government use. As the Washington Supreme Court noted, when a municipal corporation ". . . acts beyond its specific statutory authority, no contract obligation is created." *Chem Bank II*, 102 Wn.2d at 912 (Appendix A at 39). The *ultra vires* Agreement vested no property right in the Petitioners.

Further, the ability of the bondholders to enforce an unconditional payment obligation against municipal corporations, by virtue of the *ultra vires* Agreement to which they were not parties, is not a right that had ". . . the law back of them." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). As the Washington Supreme Court noted, no Washington decision had ever ". . . found authority for a project in which the participants did not have an ownership interest." *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). At best, Petitioners had an "interest in anticipated gains" based upon their expectation of the participants' statutory authority. As the Washington Supreme Court observed, ". . . the record indicates that from the outset of the projects there were questions about the statutory authority of some 16 participants . . . ." *Chem Bank I*, 99 Wn.2d at 796 (Appendix B at 23).

As this Court has repeatedly recognized, ". . . a mere unilateral expectation . . . is not a property interest entitled to protection." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). Petitioners' unilateral expectation that Washington law authorized the participants to execute an agreement containing an unconditional payment obligation without any ownership interest is not a property interest cognizable under the Taking Clause.

B. *No Taking For Government Use Has Occurred*

To posit a substantial question under the Takings Clause, Petitioners must demonstrate that a "taking" of their property interest has occurred. Under the Takings Clause, every ". . . reduction in the value of property is not necessarily equated with a taking." *Andrus v. Allard*, 444 U.S. 51, 66 (1979). Even the total destruction of the value of the property interest does not automatically compel the conclusion that a compensable tak-

ing has occurred. *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Diminution in value has never been the sole litmus test. A more sophisticated analysis has been employed to ascertain whether there was a direct appropriation for government use, or merely a consequential injury due to the exercise of lawful power. It has long been recognized that ". . . for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. The character of the power exercised is not material." *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1922).

In this case, there was no direct appropriation of a property interest for government use. There has been no expropriation of real property, (*Hughes v. Washington*, 389 U.S. 290 (1967)); no intrusion by governmental use, (*Kaiser-Aetna v. United States*, 444 U.S. 164 (1919)); no regulation so onerous as to constitute a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). All that has occurred is the lawful exercise by a state court of its power and duty to interpret state law at the request of the Petitioners. As this Court has recognized, the exercise of such authority does not constitute a "taking" merely because a contract upon which parties may have relied is declared null and void. *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U.S. 320 (1901). Any damage which the Petitioners may have suffered is consequential to the exercise of lawful judicial authority, and does not amount to a taking for government use under the Fifth Amendment. *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1922).

C. *The Takings Clause Does Not Require State Law To Conform To The Litigants' Expectations*

In a number of cases where a property interest has been injured by government regulatory or legislative ac-

tion, the Court has looked at three indicia to determine if a compensable taking has occurred: the character of the governmental action; the economic impact of the action; and the reasonableness of the investment-backed expectation. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Although the absence of legislative or regulatory action in the instant matter makes the use of these criteria inappropriate, nevertheless, their application to the facts of this case leads to the conclusion that no compensable taking has occurred.

Regarding the character of the government action, "a taking may more readily be found when the interference with property can be characterized as a physical invasion by government. . ." *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982). In this matter, there was a judicial interpretation of state law which declared a contract null and void. No property was invaded for government use; no pre-existing rights were appropriated. Rather, after the normal course of judicial process, the Washington Supreme Court answered a state law question of first impression. No decision of this Court has been cited for the proposition that the discharge by a state supreme court of its judicial function of interpreting state law constitutes a compensable taking under the Fifth Amendment. To find a compensable taking each time a state court interprets state law in a manner that impinges on a contract would ". . . effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

As for the economic impact of the government action in this case, to date it cannot be stated with finality that the Petitioners have suffered any economic impact. Although they have lost one "strand" of their bundle of property rights, the ability to rely on payment under the terms of the *ultra vires* Agreement, they still have numerous alternative forums and remedies through which

they can, and presently are attempting to, obtain return of their investment. Until these remedies are exhausted, it cannot be stated with certainty that the Petitioners have suffered any economic impact.[6]

Finally, the Petitioners' investment-backed expectation that all 88 participants had legal authority to make an unconditional promise to pay was not reasonable. As the Washington Supreme Court noted, ". . . from the outset of the projects there were questions about the statutory authority of some 16 participants . . ." to execute the Agreement. *Chem Bank I*, 99 Wn.2d at 796 (Appendix B at 23). In every Official Statement of each Bond Issue for the Projects, the Supply System's bond counsel would only warrant that 72 of the 88 participants had the legal authority to execute the Agreement. Petitioners were thus on notice that there were serious questions regarding the legal authority of some of the participants. In the face of this information, the Petitioners cannot now claim a reasonable investment-backed expectation that all participants possessed the requisite legal authority.

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[6] Petitioners and certain *amici* have suggested that this decision by the Washington Supreme Court has thrown the municipal bond market into chaos and disarray, and that only intervention by this Court can avert calamity. See, Petition for Writ of Certiorari, p. 9; Brief of *Amicus* Solomon Brothers, *et al.*, p. 3. These assertions are flatly contradicted by the facts. Since the Washington Supreme Court issued its decision, Washington public utilities have either issued or participated in the issuance of municipal bonds worth in excess of $487 million. In addition, two of the largest public utilities in Washington have subsequently issued or participated in the issuance of substantial bond offerings to finance the construction of generating resources. The District, the largest participant in the Projects, sold bonds worth $241.6 million to finance the Sultan Hydroelectric Project. The City of Seattle, which is a member of the Supply System, has participated in the issuance of bonds worth $104 million to finance the Lucky Peak Project. The sale of bond issues of this magnitude, subsequent to the decision in this case, hardly depicts a municipal bond market in the throes of chaos.

Possession of this type of knowledge ". . . disposes of the taking question . . ." *Ruckelshaus v. Monsanto Co.*, 81 L. Ed. 2d 815 (1984).

In essence, Petitioners argue that any judicial decision which is contrary to the "unilateral expectation" of an investor constitutes a "taking" under the Fifth Amendment. Under Petitioners' approach, any litigant who could allege that their investment expectation was upset by a judicial decision, even in the absence of any supporting precedent, would have an actionable claim under the Takings Clause. Not only would such an approach severely limit the ability of the state judiciary to interpret state law, but it also would entitle every disgruntled contract litigant to a Writ of Certiorari to this Court.

The Takings Clause has never stood for the proposition that the ability of the judiciary to declare the law is limited by the expectations of the parties, be they investors or otherwise. ". . . [T]he construction of a statute does not take a party's property without due process simply because it takes him by surprise, . . ." *O'Neil v. Northern Colorado Irrigation Co.*, 242 U.S. 20, 26 (1916). Petitioners ask this Court to hold that they have a vested property interest in the law as they expected it to be, and to reverse the state court decision because it conflicts with their expectations. Such an approach would be unprecedented, and require this Court to step well beyond its jurisdiction.

> This court is without authority to review and revise the construction affixed to a state statute as to a state matter by a court of last resort of the state.

Terrace v. Thompson, 263 U.S. 197, 224 (1923).

This Court has already considered and rejected virtually identical Takings Clause arguments previously asserted by these same Petitioners as a basis for the exercise of this Court's jurisdiction. *Asson v. City of Burley*, 105 Idaho 432, 670 P.2d 839 (1983) (Appendix I), *cert.*

denied, 105 S. Ct. 219 (1984). The same result should obtain this case.

D. *The Decision Below Is Consistent With Established Precedent*

Petitioners have attempted to manufacture a conflict between the decision in this case and prior holdings of this Court by relying upon selected quotes from concurring opinions and cases which are clearly distinguishable. The cases relied upon by Petitioners provide no basis for issuing a Writ of Certiorari.

Petitioners place primary reliance on *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). This case involved a state law which required court clerks to invest money paid into the court for interpleader actions, and to retain any interest income. In essence, this statute appropriated to the county the use of private funds during the litigation. In sustaining this statute, the court below overruled a long established general rule that interest on interpleaded funds is allocated to the ultimate owners.

On appeal, this decision was reversed. In a narrow holding limited to the facts of the case, this Court ruled that a statute which appropriated to the county the use of private funds as the price for gaining access to the judicial system offended the Fifth Amendment. The Court analogized the operation of this statute to the appropriation of real property for government use found objectionable in *United States v. Causby*, 328 U.S. 256 (1946).

The case at bar presents a wholely different situation. Here there is no state statute requiring litigants to contribute their interest earnings to the state in order to seek judicial redress. Nor does it involve a state court overturning a long established and generally accepted common law rule. Rather, it involves a state court interpreting for the first time a state law in order to answer a question never before posed to the Washington courts.

There has been no "assumption of ownership" by legislative action which the Court found offensive in the *Webb* case.

The other case relied upon by the Petitioners lends even less support to their position. *Hughes v. Washington*, 389 U.S. 290 (1967) presented this Court with the question of whether state or federal law controlled title to accretions. The Court held that title to accretions along navigable waterways is controlled by federal rather than state law. The majority decision found no Takings Clause issue. Because of this, Petitioners are forced to rely upon language extracted from a concurring opinion to the effect that a sudden change in the well-established common law by a state court may constitute a "taking."

Even assuming, *arguendo*, that the selected quote from a concurring opinion correctly states the law, it has no application to the case at bar. In contrast to the *Hughes* case, the decision in this matter does not deprive anyone of an interest in real property, nor does it reverse a long established common law rule governing real property interests. At most, the decision in this case interpreted a state law provision in order to provide an answer to a question which had never before been posed. Neither the *Hughes* case, nor any other decision of this Court, stands for the proposition that the Takings Clause prohibits state courts from interpreting state statutes to answer questions of first impression.

II. This Case Does Not Present A Contract Clause Question

Amicus Public Securities Association assert that the decision in this case abridged contractual rights, in violation of the Contract Clause. (U.S. Const. Art. I. § 10, cl. 1). Brief in Support of Petition, pp. 16-19. *Amicus* argues that the same considerations underpin both the Due Process and Contract Clauses, and both should be applied to this case. This argument is devoid of merit.

The decisions of this Court have established beyond argument that the Contract Clause, by its plain language, ". . . is directed only against impairment by legislation, and not by judgments of courts." *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 448 (1924). It has been made abundantly clear that ". . . the constitution affords no protection as against an impairment [of contract] by judicial decision." *Columbia Railway Gas & E. Co. v. South Carolina*, 261 U.S. 236, 244 (1923). Were this not so, the state judiciary could be rendered impotent by the mere expedient of executing a contract.

Contrary to the assertions of *amicus*, this rule of law is not subject to exception when the state's own contract is involved. As this court made clear in *United States Trust v. New Jersey*, 431 U.S. 1 (1977), strict scrutiny will be employed when a state abrogates its own contract by legislation. However, no level of scrutiny under the Contract Clause, strict or otherwise, will be applied to judicial decisions which impair contractual rights. This case presents no Contract Clause question.

III. No Substantial Procedural Due Process Question Is Presented

The Due Process Clause requires that litigants be afforded notice and an opportunity to be heard at a meaningful time and place. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). The Due Process Clause neither guarantees that the law will be interpreted in conformance with the Petitioners' expectations, nor that a particular result will be assured. The Due Process Clause requires only that the parties be given a fair chance to state their case. *Grannis v. Ordean*, 234 U.S. 385 (1914).

The record of this case amply demonstrates that Petitioners were given numerous opportunities to brief and argue every conceivable theory before the trial court and the Washington Supreme Court. Further, the record es-

tablishes that Petitioners took advantage of every opportunity presented to vigorously press their case. The requirements of the Due Process Clause were more than satisfied.

A. *The Issue Of The Participants' Control Of The Projects Was Properly Decided As A Matter Of Law*

It is well settled that due process is a flexible concept adopted to the circumstances of each individual case. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482-83 (1982). The Due Process Clause requires an opportunity for ". . . a hearing appropriate to the nature of the case". *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The type of hearing appropriate to a particular case is largely dependent on the nature of the issues involved. An evidentiary hearing is not required in a case involving exclusively legal issues. *Codd v. Velger*, 429 U.S. 624 (1977) (*per curiam*); J. Nowak, *Constitutional Law*, Ch. 15, p. 556 (2nd Ed. 1983).

> Due process is not an unvarying standard; what process is due always depends upon the interest effected. The only issues at the hearing were ones of law. . . *In such circumstances due process does not require a full evidentiary hearing but only adequate opportunity for argument.* . . . (Emphasis added.)

Conn. St. Dept. of Public Works v. Dept. of Health, Education & Welfare, 448 F.2d 209, 212 (2nd Cir. 1971).

In this case, the Washington Supreme Court noted that it had ". . . never found authority for a project in which the participants did not have an ownership interest." *Chem Bank I*, 99 Wn.2d at 785 (Appendix B at 12). However, the court recognized that control of the Projects could be equivalent to ownership. In order to give every conceivable benefit of the doubt to the Peti-

tioners, the court examined the Agreement ". . . to determine whether the participants retained sufficient interest." *Chem Bank I*, 99 Wn.26 at 787 (Appendix B at 14). The court reviewed the operation of the unambiguous terms of the Agreement, and concluded as a matter of law that it did not grant the participants control of the Projects equivalent to ownership. *Id.*

This interpretation of the contractual language involved a question of law, and did not raise any factual issues. As the Washington Supreme Court noted, under Washington law, this issue was properly resolved as a matter of law. *Chem Bank II*, 102 Wn.2d at 894 (Appendix A at 20), citing *Kelly v. Aetna Cas. & Surety Co.*, 100 Wn.2d 401, 670 P.2d 267 (1983). Accordingly, the Washington Supreme Court's consideration of this issue on at least two separate occasions afforded the Petitioners a hearing appropriate to the nature of the issue and fully satisfied the demands of due process.[7]

The Petitioners attempt to circumvent this rule of law by arguing that since several participants were Supply System members, a factual question was raised requiring an evidentiary hearing.[8] This argument seriously misconstrues the Washington Supreme Court's decision on the control issue.

The question posed to the Washington Supreme Court was whether the Agreement granted the participants ". . . sufficient control over the project to constitute the equivalent of ownership." *Chem Bank I*, 99 Wn.2d at 787 (Appendix B at 14). To determine the statutory

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[7] The issue of the control retained by the participants over the Projects under the Participants' Agreement was addressed in both decisions of the court, as well as in the Petitioner's unsuccessful motion for reconsideration after the June, 1983, decision.

[8] This is in direct conflict to the position previously taken by the Petitioners. In the trial court proceedings, the Petitioners moved for summary judgment on the basis that all issues could be resolved on purely legal grounds.

validity of this contract, the court properly focused its attention on the terms and conditions of the Agreement. As the court recognized, it was only by analyzing the terms of the Agreement that it could determine the degree of control, if any, exercised by the utilities in their role as participants.

There are a number of other pertinent factors which support the Washington Supreme Court's focus on the Agreement in resolving the control issue. The Court's purpose in analyzing this issue was to determine whether the participants had statutory authority when they executed the Agreement in 1976. Some of the participants did not become Supply System members until after the Agreements were executed, and the majority of the participants never became Supply System members. Since it is the utility's authority at the time the Agreement was signed which was critical, the court had to focus on the authority each utility possessed as a participant under the Agreement at the time of execution, regardless of any collateral status as a Supply System member.

Further, any control which the participants may have exercised by virtue of their Supply System membership was too transitory to be considered equivalent to an ownership interest. The rights of Supply System members were subject to legislative modification at any time.[9] The fact that control incident to Supply System membership could be modified or eradicated at any time rendered it too ephemeral to constitute the equivalent of an ownership interest.

In view of the foregoing, the Washington Supreme Court properly limited its focus to the actual language of the Agreement in resolving the control issue. Accordingly, resolution of the issue as a matter of law in no way deprived the Petitioners of due process.

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[9] The Washington Legislature has on two occasions modified the rights of Supply System members. 1981 Wash. Laws, ch. 3, § 2 (1st Ex. Sess.); 1983 Wash. Laws, ch. 3, § 3 (1st Ex. Sess.).

B. *The Availability Of Equitable Remedies Was Properly Decided As A Question Of Law*

As discussed above, the Due Process Clause does not require an evidentiary hearing for the adjudication of issues of law. *Codd v. Velger*, 429 U.S. 624 (1977) (*per curiam*). Accordingly, since the Washington Supreme Court's ruling on the inapplicability of equitable remedies was supportable on entirely legal grounds, deciding this issue as a matter of law did not impinge upon Petitioner's due process rights.

The Washington Supreme Court's determination that the application of equitable remedies was precluded as a matter of law because the execution of the Agreement was substantively *ultra vires* was based on long established Washington precedent. Estoppel and other equitable relief are not available against a governmental entity for an *ultra vires* act which is void because it is done wholly without legal authorization. *Finch v. Matthews*; 74 Wn.2d 161, 443 P.2d 833 (1968); *Arbogast v. West Port*, 18 Wn. App. 4, 567 P.2d 244 (1977). Where a municipality lacks substantive authority to enter into a contract, the contract is absolutely null and void, and there can be no recovery on any equitable theory against the municipality. *See, e.g., Osborne, Tremper & Co. v. King County*, 76 Wash. 277, 285-86, 136 P. 138, 141 (1913); *State ex rel. Craig v. Newport*, 70 Wash. 286, 292-94, 126 P. 637, 640 (1912). The principle is well settled that one cannot do indirectly what cannot be done directly, and when there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel. *See, State v. Pullman*, 23 Wash. 583, 63 P. 265 (1900).

The court concluded that because the Washington municipal utilities lacked the statutory authority to execute the Agreement, it was substantively *ultra vires*, and as a matter of state law "the doctrine of substantively

ultra vires activity thus precludes recovery." *Chem Bank II*, 102 Wn.2d at 911 (Appendix A at 38). Because equitable remedies were precluded as a matter of law, there were no factual issues relevant to the availability of equitable remedies. Consequently, the issue was properly resolved by the Washington Supreme Court as a matter of law.

The Petitioners attempt to bolster their Due Process claim by alleging that the Washington Supreme Court's decision on the inapplicability of equitable remedies was based wholly on their failure to seek a declaratory judgment on the participants' legal authority. This line of reasoning is without merit, and seriously misinterprets the decision in this case.

As the Washington Supreme Court made abundantly clear, the denial of equitable remedies was based on the finding that the Washington municipal utilities lacked the statutory authority to execute the Agreement, and as a matter of state law that act was substantively *ultra vires*, rendering the Agreement void in all respects. It is well settled that the Supreme Court will not review judgments of state courts which rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117 (1954); *Camp v. Board of Pub. Inst.*, 368 U.S. 278 (1961). Here, the Washington Supreme Court's denial of equitable relief rests firmly on state law, the application of the *ultra vires* doctrine. The court's aside regarding a possible declaratory judgment action was not crucial to the ultimate holding on this issue, and provides no legitimate basis for granting Petitioners' request for review.

Furthermore, the existence of an indisputable basis for denying equitable relief under the *ultra vires* doctrine demonstrates that the court's aside regarding a possible bondholder declaratory judgment action can amount to no more than harmless error. Such harmless

error would have to be disregarded by the Supreme Court if it were actually to rule on Petitioners' Writ of Certiorari. 28 U.S.C. § 2111. The court's aside provides no basis for granting review, nor does it present a substantial federal question even if it is assumed, *arguendo*, that the court was in error. As this Court has stated:

> We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question.

Gryger v. Burke, 334 U.S. 728, 721, *reh'g denied*, 335 U.S. 837 (1948).

IV. The Due Process Clause Does Not Require Certain Justices' To Disqualify Themselves

Petitioners contend that they were denied an impartial tribunal because two of the Washington Supreme Court Justices were customers of one or more of the participants. This contention is unfounded. A judge's incidental, remote or contingent pecuniary interest in the subject matter of an action, such as that alleged by Petitioners, is insufficient to mandate disqualification. *See, Nueces County Drainage & Conservation District No. 2 v. Bevly*, 519 S.W.2d 938, 951-52 (Tex. 1975). Indeed, the federal courts have specifically recognized that where a utility is a party, the ratepayer status of a judge is not disqualifying. *See, e.g., New Orleans Public Services v. United Gas Pipe Line*, 719 F.2d 733, 735 (5th Cir. 1983); *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794 (1980). These legal authorities are dispositive, and establish that the ratepayer status of the two Washington Supreme Court Justices did not mandate their disqualification or intrude upon Petitioners' due process right to an impartial tribunal.

CONCLUSION

Petitioners have attempted to manufacture a constitutional claim where none exists. This is a case of a state court interpreting state law and the unambiguous terms of a contract. Although the question presented is one of first impression, the fact that the answer was contrary to the expectations of the Petitioners does not create a substantial federal question. If Petitioners have suffered harm by this decision, their remedy lies in pursuing negligence and reliance claims in state and federal courts, which they are currently doing with great vigor. The decision below was based upon adequate state law grounds, and no substantial federal questions have been presented to warrant the exercise of this Court's jurisdiction. The Petition for a Writ of Certiorari to the Washington Supreme Court should be denied.

Respectfully submitted this 5th day of April, 1985.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT CITY OF ELLENSBURG, WASHINGTON, IN OPPOSITION

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QUESTIONS PRESENTED

1. Were purchasers of municipal bonds issued by the Washington Public Power Supply System to finance construction of two electrical power plants deprived of property without just compensation as a result of the decision of the Washington Supreme Court holding that Washington municipalities and public utility districts had no authority to incur financial obligations with respect to the plants and that the bondholders could not require the project participants to bear the loss of their investments under equitable theories of restitution or estoppel?

2. Did the Supreme Court of the State of Washington in two reasoned decisions based upon a consistent application of long-standing Washington state precedent

unconstitutionally deprive bondholders in public electrical power projects of due process by holding that Washington municipal corporations and public utility districts did not have authority to enter into contracts to purchase electrical power project capability?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings set forth at pages iii-v of the Petition for Certiorari correctly identify the parties to this litigation.

This Brief in Opposition to Petition for Certiorari is submitted by the Respondent City of Ellensburg, Washington, one of 88 municipalities, public utility districts, irrigation districts, and rural electric cooperatives which are parties to the Participants' Agreement which is the subject of this litigation.

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No. 84-1258

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE RESPONDENT CITY OF ELLENSBURG, WASHINGTON, IN OPPOSITION

Respondent City of Ellensburg, Washington, respectfully prays that this Court deny the Petition for Certiorari submitted by Chemical Bank and the Washington Public

Power Supply System seeking review of the decision of the Supreme Court of the State of Washington in Chemical Bank v. Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984) ("Chemical Bank II"), Appendix A to the Petition for Certiorari.

Respondent City of Ellensburg also respectfully prays that this Court deny the Petition for Certiorari submitted by Petitioners Fredric Haberman, Claude Purvis, Nerow Cheng, Ted R. Pape, Audrey L. Moss, and John H. Biggs seeking review of that portion of Chemical Bank II denying their motion to intervene in Chemical Bank II.[1]

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1 Although the Haberman petitioners have asked the Court to consider their Petition for Certiorari only if certiorari is granted in the primary case, No. 84-1258, Respondent City of Ellensburg respectfully prays that this Court deny the Haberman Petition for Certiorari, regardless of the disposition of the present case, on the grounds that no substantial federal question is presented by Haberman. The City of Ellensburg adopts and incorporates by reference the Brief of Washington Public Utilities Group in Opposition to Petition for Certiorari filed in No. 84-1414.

OPINIONS BELOW

The recitation at pages 1-2 of the Petition for Certiorari is a generally accurate summary of the proceedings below.

JURISDICTION

The Respondent City of Ellensburg disagrees with the statement of jurisdiction at page 2 of the Petition. Certiorari will be granted to review the decision of a state's highest court only where (1) the state court decision does not rest on state law grounds adequate to sustain the decision; (2) the federal questions for which review is sought have been duly raised and adjudicated before the state court and are substantial; and (3) there are special and important reasons compelling this Court's review of the case. Herb v. Pitcairn, 324 U.S. 117 (1954); 28 U.S.C. § 1257; Sup. Ct. R. 17.1.

Despite the Petitioners' best efforts to couch its dissatisfaction with the

decision below in language resembling that of federal constitutional issues properly within this Court's jurisdiction to consider, no federal question of substance is presented by this case. The decision below is based squarely on an application of Washington state law.

Further, there are no special and important reasons compelling this Court's review. Contrary to the assertions of Petitioners and the amici, this case has had no significant effect on the national municipal bond markets or on the ability of municipalities in the Pacific Northwest to raise funds through municipal bond offerings.

STATEMENT OF THE CASE

Introduction

The Statement of the Case contained in the Petition for Certiorari does not accurately characterize either the proceedings below or the facts of this case.

For example, contrary to Petitioners' very first assertion in their Statement of the Case, this case does not arise from a municipal bond default. The default by the Petitioner Washington Public Power Supply System (the "Supply System") on municipal bonds it issued to construct two nuclear power plants, WNP 4 and 5, occurred as a consequence of the holdings in this case. The default occurred during the pendency of this case and as a result of decisions in this case and in related cases which hold that the Participants' Agreement between the Supply System and the 88 participants who had contracted to purchase portions of the electrical power capability of WNP 4 and 5 were not enforceable.

Similar mischaracterizations of pertinent facts occur in other parts of the Petition. These inaccurate statements are the result of the Petitioners' attempt

to cast this case, decided solely on state law grounds, as one involving substantial issues of federal law.

Summary of Procedings

Construction of WNP 4 and 5 was commenced by the Supply System in 1977 after it sold varying portions of the electrical power capability of the projects to each of 88 consumer-owned utilities pursuant to the terms of the Participants' Agreement dated July 14, 1976. Under the Participants' Agreement, the 88 participants each agreed to pay the Supply System for a specified portion of the project capability of WNP 4 and 5 without regard for whether the plants ever produced any power (the "hell or high water" or "dry hole" provisions of the Participants' Agreement).

Construction of WNP 4 and 5 was funded by the Supply System's sale of 14 issues of municipal bonds between March,

1977, and April, 1981. Because of delays, cost increases, and escalating interest rates--factors which plagued the whole nuclear industry in the late 1970's--it became increasingly difficult to finance the projects. Further, as projected costs escalated, it became clear that the regional market for power would not materialize. See Petition at 7.

On January 22, 1982, with the concurrence of the participants, the Supply System terminated WNP 4 and 5. In May, 1982, Petitioner Chemical Bank, the bondholders' trustee, commenced this suit in the Superior Court for King County, Washington, seeking to determine the WNP 4 and 5 participants' obligations of the 88 participants to make payments to the Supply System pursuant to the terms of the Participants' Agreement.

On June 15, 1983, the Washington Supreme Court issued its first decision in this suit, Chemical Bank v. Washington

Public Power Supply System, 99 Wn.2d 772, 666 P.2d 329 (1983) ("Chemical Bank I"), Appendix B to the Petition for Certiorari. The Washington court ruled in Chemical Bank I that the Participants' Agreement was ultra vires and therefore unenforceable with respect to the Washington municipalities and PUDs and remanded the case to the trial court for further proceedings. On July 22, 1983, the Supply System defaulted on the bonds it had issued to finance construction of WNP 4 and 5.

On remand following the decision in Chemical Bank I, the trial court ruled that the Participants' Agreement was also unenforceable with respect to the Oregon and Idaho participants and Washington cooperatives based upon a frustration of purpose theory and denied Chemical Bank's claims that the Participants' Agreement should be enforced against the participants on equitable grounds. The Washing-

ton Supreme Court affirmed these rulings in Chemical Bank II, in which it also confirmed its ruling in Chemical Bank I that the Participants' Agreement was ultra vires with respect to the Washington municipal participants.

The Participants Did Not "Repudiate" Their Project Obligations.

Petitioners' repeated assertions that the participants repudiated their obligations to the Supply System under the Participants' Agreement, Petition at 3, 4, and 8, are incorrect.

The participants are a widely diverse group of consumer-owned utilities. The 88 participants include 9 Washington cities (one of which is the Respondent City of Ellensburg), 19 Washington Public Utility Districts ("PUDs"), 1 Washington irrigation district, 7 Oregon cities, 4 Oregon PUDs, 5 Idaho cities, and 43 rural electric cooperatives.

The responses of the participants to the termination of WNP 4 and 5 were the result of independent judgments made by the elected officers and managers of each participant. These judgments were based upon each participant's analysis of its obligations under the Participants' Agreement and its constitutional and statutory obligations to its constituents and ratepayers.

Upon the termination of WNP 4 and 5 in January, 1982, many participants raised their electrical rates to enable them to pay their obligations to the Supply System under the Participants' Agreement. A number of participants were taken to court by groups of ratepayers who challenged the validity of the Participants' Agreement and sought to enjoin any rate increases

implemented to pay for the terminated projects.[2]

The participants are all required by law to manage their electric utilities in the interests of their ratepayers. The specific powers and authority of the 88 participants vary widely. Some participants sought judicial determination of their obligations under the Participants' Agreement;[3] others supported the Agreement against challenge by the ratepayers.

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2 E.g., Borgens v. City of Ellensburg, Kittitas County, Washington Superior Court Cause No. 23263 (filed May 26, 1982); Asson v. City of Burley, 105 Idaho 432, 670 P.2d 839 (1983), cert. den., 105 S. Ct. 219 (1984) (filed August 11, 1982); Penfold v. Fall River Rural Electric Cooperative, Inc., Teton County, Idaho District Court Cause No. 1915 (filed April 7, 1982); DeFazio v. Washington Public Power Supply System, 296 Ore. 550, 679 P.2d 1316 (1984) (filed February 22, 1982).

3 E.g., Columbia Rural Electric Assoc., Inc. v. Washington Public Power Supply System, Lewis County, Washington, Superior Court Cause No. 40202 (filed April 23, 1982). The independence of the participants' actions is further illustrated by the varying responses of the participants to the Petition for Certiorari herein. The participants are not a single united group in this case.

When Chemical Bank brought this action in Washington state court to enforce the Participants' Agreement, many participants chose to require Chemical Bank to prove that the Participants' Agreement was enforceable in order to avoid challenges by ratepayers that payments made by participants to finance WNP 4 and 5 were ultra vires or otherwise improper. The decision of many of the participants to require Chemical Bank to satisfy its burden of proof in the litigation it commenced was not compelled by improper motives. Most participants are obligated to spend funds only as authorized by existing law. The participants, like Chemical Bank, were anxious to obtain a judicial declaration of their obligations under the Participants' Agreement.

The Respondent City of Ellensburg Did Not "Repudiate" the Participants' Agreement.

The City of Ellensburg, Washington, is a third-class city with a population of approximately 12,000. Like all Washington cities, its municipal authority is limited to that granted by the Washington state constitution and by the Washington legislature. Ellensburg operates municipally-owned natural gas and electrical utilities distribution systems. It does not own any electrical generating facilities and is dependent upon the Bonneville Power Administration for its supply of electricity.

As a municipal entity, Ellensburg is charged by Washington state law with management of its electrical utility in the best interests of its ratepayers. Payment of funds by Ellensburg to satisfy unenforceable, invalid, or ultra vires obligations would not only breach the city's duty to its constituents, but also

could subject its officials to personal liability for the wrongful expenditure of municipal or ratepayers' funds. See State ex rel. O'Connell v. Engen, 60 Wn.2d 52, 371 P.2d 638 (1962).

Termination of WNP 4 and 5 in January, 1982, meant that Ellensburg's obligations to the Supply System under the Participants' Agreement could not be funded from the sale of electrical power produced by the projects. On February 24, 1982, Ellensburg began consideration of a 37% increase in its electrical rates primarily to pay Ellensburg's share of the costs of WNP 4 and 5. This increase was adopted on April 19, 1982, as City Ordinance No. 3351.

On May 26, 1982, certain Ellensburg electrical power ratepayers brought suit in the Superior Court for Kittitas County, Washington, to enjoin the collection of the rate increase on the ground that

Ellensburg's obligations under the Participants' Agreement was invalid and unenforceable. Borgens v. Ellensburg, Kittitas County Superior Court Cause No. 23263. Ellensburg moved for dismissal of the ratepayers' suit on the grounds that the same issues were pending before the King County Superior Court in the suit commenced by Chemical Bank on May 18, 1982. The ratepayers' lawsuit was dismissed to permit the King County Superior Court to decide all issues related to enforcement of the Participants' Agreement, including those related to Ellensburg.

During the pendency of Chemical Bank's suit before the Washington state trial and appellate courts, Ellensburg continued to collect the electrical utility surcharge implemented to pay its share of the WNP 4 and 5 costs pursuant to the Participants' Agreements despite continued

ratepayer opposition.[4] Ellensburg placed the funds collected from its rate increase in a special account and later transferred them to an escrow established by the King County Superior Court judge.

Ellensburg acted to assure that it could satisfy its obligations under its Participant's Agreement if they were adjudicated to be proper. At the same time, Ellensburg required Chemical Bank to prove that the city's obligations under the Participants' Agreement were enforceable to protect the city from allegations by its ratepayers that the Participants' Agreement was ultra vires or otherwise unenforceable.

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4 Ellensburg's imposition of the 37% rate surcharge and the purpose for which the surcharge was imposed were a matter of record in Chemical Bank's lawsuit as early as September, 1982. Indeed, in September, 1982, the Supply System intervened on the side of Ellensburg to help defend against a second ratepayer suit seeking to enjoin Ellensburg's collection of the surcharge. Nelson v. Ellensburg, Kittitas County Superior Court Cause No. 23398.

Ellensburg and the other WNP 4 and 5 participants have not acted out of selfishness or obstinancy in seeking to obtain judicial determination of their obligations under the Participants' Agreement. Petitioners have wrongly characterized the actions of the various participants as an improper "repudiation" of lawful obligations in an attempt to portray the participants as having "unclean hands" and to conceal from this Court the extensive efforts the participants took to resolve the serious legal problems they confronted upon termination of WNP 4 and 5.

The Participants Did Not Cause Termination of WNP 4 and 5.

Petitioners assert that termination of WNP 4 and 5 was "an eventuality that participants could control," Petition at 6, and that "their disapprovals of project financing plans in 1981 spelled

the projects' certain demise," Petition at 7. Yet Petitioners acknowledge that the projects were planned to avert a projected power shortfall in the region and that by mid-1981 "the projected energy demand had not materialized." Petition at 7.

Reduced electrical demand in the Pacific Northwest was an occurrence the participants could not control. By 1981, revised projections of the region's electrical demand made further construction of WNP 4 and 5 no longer feasible, as Petitioners acknowledge. The participants' concurrence in the Supply System's decision to terminate WNP 4 and 5 in 1982 was a responsible effort to limit the impact of the decision made in the mid-1970's to construct the two plants.

The Participants Have Not Wrongfully Retained Bondholder Funds or Assets.

Petitioners repeatedly assert that the participants have "refused to return any portion of the bondholders' funds." Petition at 4, 8. This allegation is unfounded and seriously misleading.

No portion of the bondholders' funds has gone to any participant. All the proceeds of sales of the WNP 4 and 5 bonds issued by the Supply System were paid to the Supply System which is a Washington municipal corporation separate from the participants, formed under Washington statute, RCW 43.52.

The cash assets remaining in the Supply System's possession at the time of default (approximately $25 million), as well as the physical assets of WNP 4 and 5, have been delivered by the Supply System to Chemical Bank, as trustee for the bondholders. If those funds and

assets have not been returned to the bondholders, it is because Chemical Bank has retained them, not because the participants have them.

The Decision Below Has Had No Substantial Effect on the Municipal Bond Markets.

In an apparent attempt to cloak this case with the "special and important reasons" this Court requires of cases it will review by writ of certiorari, petitioners and the amici have presented the court with an extremely exaggerated picture of the effect of the decision below on the national municipal bond market. However, despite widespread initial predictions that the Supply System's default would seriously disrupt the municipal bond market and cause bond offerings by Pacific Northwest municipalities to be shunned or marketable only with burdensome interest

"penalties," the default has had no such effects.

Shortly after the default in July, 1983, the Port of Tacoma, Washington, sold $26 million in municipal bonds to finance port improvements; Pierce County, Washington, the State of Oregon, and the Lake Washington, Washington School District also successfully sold relatively small municipal bond issues. It has been estimated that these entities may have paid 0.25 to 0.50 percent in interest above what would have been required in the absence of the default. In August, 1983, the State of Washington successfully made a general obligation bond offering in which it was estimated its interest "penalty" was 0.46 to 0.50 percent. In a later bond sale by the state, the estimated "penalty" dropped to 0.25 percent. In November, 1983, the Snohomish County PUD, the utility which had the largest

participant's share of WNP 4 and 5, 13.051 percent, successfully made a $200 million bond offering for which it was estimated it paid an interest "penalty" resulting from the Supply System's default of about 0.6 percent.[5]

Those who purchased WNP 4 and 5 bonds sought an attractive tax-free investment. These investors incurred investment risks in purchasing these bonds, one of which was that the WNP 4 and 5 participants had exceeded their lawful authority in entering into the Participants' Agreement. Unfortunately, the risks inherent in that investment were realized and the bondholders have incurred financial losses as a result of the Supply System's default. This

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5 The statistical data in this paragraph are taken from: "1983: The Year of Default: 'Barefoot Among the Barracudas'," The Weekly (Seattle, Washington), December 19, 1984.

alone, however, does not render this case one suitable for this court's review.

Further, the minimal and diminishing effect on the municipal bond markets, even for WNP 4 and 5 participants, belies the claims by Petitioners and amici that the Supply System's default has seriously disrupted the municipal bond markets. Petitioners' assertions notwithstanding, there are no special and important reasons justifying this Court's review of this case.

REASONS FOR DENYING THE WRIT

The Writ should be denied for the reason that the decision below is based solely on issues of state law. Despite petitioners' best efforts to weave a federal constitutional argument from a unique combination of the Takings and Due Process Clauses of the federal constitution, the essence of their Petition simply

is that they believe that the Washington Supreme Court wrongly decided this case and that this Court should exercise its discretionary jurisdiction to reverse the decision of the Washington court based on Washington law.

The policies embodied in the concept of federalism, the statutes governing this Court's jurisdiction, and this court's own rules wisely preclude this Court's review of this case because it was decided solely upon state law grounds and does not violate any federal constitutional rights of the Petitioners.

1. The Washington Supreme Court's Decision is Based Solely Upon State Law.

The Washington Supreme Court decision declaring the Participants' Agreement to be unenforceable is based solely upon state law. The determinative element of the decisions in both Chemical Bank I and

Chemical Bank II is the court's careful analysis of the statutory authority of Washington state municipalities and PUDs to enter into the Participants' Agreement. This issue directly involved 28 of the 88 participants in WNP 4 and 5: 9 Washington cities, including the City of Ellensburg, and 19 Washington PUD's (collectively the "Washington municipal participants").

Following its analysis of the authority of the Washington municipalities and PUD's, the court concluded that the Washington municipal participants did not have authority to incur the obligations imposed by the Participants' Agreement. Consequently, the Participants' Agreement was declared to be void and unenforceable against the Washington municipal participants under the ultra vires doctrine

applicable to Washington municipal corporations.[6]

Under Washington state law, the rule that express statutory authority must be found for municipal action arises from the fact that Washington municipal corporations are creatures of the sovereign state. Wash. Const. art. I, § 1, art. XI, § 10. "A [Washington state] municipal corporation, being but a creature of the state, derives its existence, powers, and duties, from the legislative body of the state." Town of Othello v. Harder, 46 Wash. 747, 284 P.2d 1099 (Wash. 1955). This rule is one of long standing in Washington State. See generally Trautman, Legislative Control

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6 Although the court continued its analysis in Chemical Bank II to determine the effect on the other participants of its decision regarding the Washington municipal participants, that part of the court's decision does not affect the instant Respondent City of Ellensburg and will not be addressed here.

of Municipal Corporations in Washington, 38 Wash. L. Rev. 743 (1963).

The enforceability of municipal contracts containing "hell or high water" or "dry hole" provisions similar to those in the Participants' Agreement, in which the extent of a municipality's obligation is not dependent upon the success of a project, has been considered by a number of state courts. In each such case, the applicable state statutory and constitutional principles have been analyzed to determine the powers and authorities of local municipalities in the respective state.

Contracts containing "hell or high water" or "dry hole" provisions have been held to be enforceable in Board of Commissioners v. All Taxpayers, Property Owners, and Citizens, 360 So. 2d 863 (La. 1978); State ex rel. Mitchell v. Silkeston, 555 S.W.2d 281 (Mo. 1977); Johnson v. Piedmont

Municipal Power Agency, 287 S.E.2d 476 (S.C. 1982); State ex rel. Grimes, County Taxpayers Association v. Texas Municipal Power Agency, 565 S.W.2d 258 (Tex. Civ. App. 1978); and Frank v. Cody, 572 P.2d 1106 (Wyoming 1977). Similar contracts have been held to be unenforceable in Chemical Bank and Washington Public Power Supply System v. Asson, 670 P.2d 839 (Idaho 1983), cert. den., _____ U.S. _____, 105 S. Ct. 219 (1984), as well as in Chemical Bank I and II.

This Court has consistently held that it will not review state court decisions which rest on independent and adequate state law grounds and that it will accept the interpretation of state law by a state's highest court. E.g., Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976). Principles of federalism and comity preclude this court's reviewing decisions

grounded in state law, even if this court might have reached different results on the state law issues. Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932).

If the Court should grant certiorari in this case, it would open its doors to certiorari petitions in every decision by state courts of last resort in which the enforceability under state law of municipal obligations is at issue. To do this would radically change the role of this Court in matters of local financial control.

The validity of the Participants' Agreement, like that of other municipal obligations, is properly an issue to be determined by the respective state courts and not by this Court. This Court should not grant certiorari in this case and thereby intrude into matters of local government traditionally reserved for local control.

2. The Petitioners Have Not Raised a Substantial Federal Question Under the "Takings Clause."

The Petitioners argue that the Takings Clause (U.S. Const. amend. V, cl. 4) has been violated by the Washington court's decision. First, no unconstitutional taking of private property has occurred in this case. This case simply involves a state court's determination of the validity and enforceability of certain municipal contracts. Further, the participants have not effected an unconstitutional taking of the bondholders' property. This is demonstrated by the fact that no participant has ever received any property of the bondholders or assets purchased from proceeds of the bonds as a consequence of the Participants' Agreement or the sale of

bonds by the Supply System.[7]

To constitute a compensable taking, there must be an invasion of existing private property rights by a governmental entity which causes a diminution in those rights. See Webbs' Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980); Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

In this case, the value of the bondholders' investments was affected by a reasoned judicial determination, based

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7 This case involves only the enforceability of the Participants' Agreement. As is briefly referenced by Petitioners, Petition at 13-14, extensive litigation independent from this case related to the Supply System's default on the WNP 4 and 5 bonds presently is pending in both federal and state courts. Claims brought on behalf of the bondholders based on securities fraud, misrepresentation, negligence and other grounds against the Supply System, the participants, bond counsel, underwriters, attorneys for the Supply System and participants, contractors and others remain to be determined. The Washington Supreme Court's decisions in Chemical Bank I and II have not left the bondholders without avenues of redress for their investments in the Supply System.

upon a consistent application of Washington state law, that the Washington municipal participants had no authority to enter into the Participants' Agreement. The Washington court's decision was that the Participants' Agreement was invalid ab initio with respect to the Washington municipal participants. To accept Petitioners' Takings Clause arguments would require this Court to abolish the long-standing doctrine in Washington State that acts of political subdivisions of the state are limited by the authority granted to the subdivisions by the state.

The Petitioners' contentions notwithstanding, the Washington Supreme Court has not "engaged in . . . retroactive munipulations of state law to 'transform private property into public property without compensation'." Petition at 18. Although the validity of municipal obligations

precisely like those created by the Participants' Agreement had not previously been adjudicated by the Washington Supreme Court, the court applied existing Washington state law in a reasoned manner to determine whether the Washington participants had authority to enter the Participants' Agreement. The decision of the Washington court as to the municipal authority of the Washington participants did not overrule a single prior decision.

The Washington court's denial of restitution to the bond holders does not constitute an unconstitutional "taking." The participants, including Respondent City of Ellensburg, have not themselves received any benefits from the bondholders' investments. The Supply System sold the WNP 4 and 5 bonds, and the proceeds therefrom were paid directly to the Supply System which is a separate municipal corporation formed pursuant to Washington

statute. None of the proceeds from the bond sales have been paid to any participant. See Chemical Bank II, Appendix A at 38.

Because the participants have received no bond proceeds or assets, there is no meaningful or practical way to require restitution of the bondholders' funds by the participants without indirectly requiring performance of obligations which the Washington municipal participants were without authority to undertake. It has long been the law in Washington that ultra vires municipal contracts cannot be enforced indirectly on equitable theories where a municipality had no legal power or authority to make the contract. Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341 (1899).

Under Washington law, when a governmental entity acts beyond its power and enters into an unenforceable contract, the

courts will not require the costs of that contract to be passed on to the citizens unless the citizens have derived a tangible benefit from the contract. State v. O'Connell, 83 Wn.2d 797, 523 P.2d 872 (1974). Denial of restitutionary relief is a direct consequence of application of the ultra vires doctrine, the very purpose of which is to protect the public or other municipal constituents from unauthorized actions by municipal officials. State v. O'Connell, supra.

In summary, any losses which have been incurred by the WNP 4 and 5 bondholders were not a result of any governmental taking, but were an incidental consequence of the Washington Supreme Court's determination of the ultra vires character of the Participants' Agreement. A loss in value to property which occurs as a mere consequential incidence of valid governmental

action undertaken in the pursuit of substantial and important public ends is not a taking. See Armstrong v. United States, 364 U.S. 40 (1960).

3. The Petitioners' Assertions That They Have Been Denied Due Process Are Without Substance.

Petitioners attempt to meet this Court's strict standards for certiorari review by asserting that the decision below denied them due process or fair procedure in violation of the United States Constitution. Petitioners point to the three aspects of the decision which they claim violated their federal due process rights: (1) the lack of a full evidentiary hearing on the issue of whether the participants "controlled" the Supply System; (2) the reference by the Washington court to the Petitioners' opportunity to seek a judicial declaration of the validity

of the Participants' Agreement prior to sale of bonds for WNP 4 and 5 by the Supply System; and (3) the fact that certain justices of the Washington Supreme Court whom Petitioners claim had indirect interests in this litigation participated in the decision in this case. None of the Petitioners' contentions raises a substantial federal due process issue reviewable by this Court.

A. The "Control" Issue.

The Petitioners make much of their claim that their due process rights were violated because they were denied a factual hearing on the issue of the participants' "control" of WNP 4 and 5. This claim is without merit.

In Chemical Bank I, the Washington Supreme Court properly held as a matter of law that RCW 35.92.050 requires Washington municipalities to have an ownership interest

in electrical generation facilities with respect to which the municipalities incur financial obligations. "[T]his court has never found authority for a project in which the participants did not have an ownership interest." Appendix B at 12.

It is undisputed that the participants did not have an ownership interest in WNP 4 and 5. However, rather than simply concluding that the absence of an ownership interest precluded enforcement of the Participants' Agreement as to the Washington municipal participants, as would have been required by existing Washington law, the court in Chemical Bank I examined the extent of the participants' control of the projects to determine whether it was sufficient "to constitute the equivalent of an ownership interest," such that the "ownership" requirement of RCW 35.92.050 might be satisfied. Appendix B at 14. After examining the Partici-

pants' Agreement and the record in detail, the court concluded that the participants did not have sufficient control of the projects to constitute the equivalent of ownership and, therefore, that the lack of an ownership interest by the participants in WNP 4 and 5 could not be remedied by resort to the "control" analysis.

Petitioners' federal due process rights were not violated by the fact that the Court went beyond its initial determination, unchallenged by Petitioners, that as a matter of law the participants' interests in WNP 4 and 5 lack several important indicia of ownership to analyze the "ownership" requirement of RCW 35.92.050. This aspect of the court's decision was an attempt to find some basis, albeit not supported by Washington precedent, to uphold the Participants' Agreement. Further, assuming that "control" alone

could substitute for the statutory requirement of ownership, the court's interpretation of the legal effect of the participants' control of WNP 4 and 5 under the Participants' Agreement was a valid exercise of the court's power to determine questions of law raised by Petitioners' suit to enforce the agreement.

B. Availability of Declaratory Judgment Action.

Petitioners' contention that they were denied due process as a result of the Washington court's reference in Chemical Bank II, Appendix A at 32, to the availability of a declaratory judgment proceeding to test the enforceability of the Participants' Agreements prior to the Supply System's sale of bonds is without merit. The Washington court's analysis of the ultra vires nature of the Participants' Agreements does not depend upon or require

the availability of a declaratory judgment action prior to the sale of the bonds.

The reference, in dictum, by the Washington court to the possibility that Petitioners could have sought a declaratory judgment does not raise a substantial federal constitutional issue.[8]

C. Recusal of Washington Supreme Court Justices.

Petitioners' third basis for their claim that they were denied due process is

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8 In addition to a special declaratory procedure whereby validity of bonds issued by any municipal corporation may be tested by a taxpayer lawsuit, RCW Chapter 7.25, Washington law provides under its general declaratory judgments statute, RCW Chapter 7.24, that a person whose rights or legal relations are affected by a municipal ordinance or contract may have the construction or validity of the ordinance determined. RCW 7.24.020, 7.24.110. The "justiciable controversy" requirement of the declaratory judgment statute would almost certainly have been met if the "test case" had been brought in 1976 or 1977 in one of the several districts where environmentalist groups had already challenged the participation of local utilities on environmental grounds.

their allegation that Washington Supreme Court justices who were ratepayers of participants took part in the Washington court's decisions, thereby denying Petitioners an impartial tribunal. This claim also fails to raise a substantial federal constitutional issue.

Petitioners claim that two of the judges sitting on Chemical Bank I and one sitting on Chemical Bank II were ratepayers of WNP 4 and 5 participants who should have disqualified themselves from this case. Any interests in this case held by these justices were remote and indirect, arising from their status as ratepayers of the participants. Such remote, indirect interests do not require a judge to disqualify himself or herself from a case.

In ruling that a federal district court judge was not required by 28 U.S.C. § 455 to disqualify himself from a case having a potential effect on natural gas

rates in his community, the Tenth Circuit Court of Appeals noted that "[A] remote, contingent benefit, such as a possible beneficial effect on future utility bills, is not a 'financial interest' within the meaning of [28 U.S.C. § 455]" requiring disqualification from a case. In re New Mexico Natural Gas Antitrust Litigation, 620 F.2d 794, 796 (10th Cir. 1980). In reversing the district court's decision disqualifying himself, the court noted that no disqualification is required where a judge's potential interest in a case is that shared by the judge in common with the general public.

The interests in this case of the Washington justices who may have been ratepayers of participants was that of members of the general public served by the participants. Such an indirect interest does not require disqualification of a judge.

Petitioners' reference to the disqualification of all the federal district judges in the Western District of Washington from litigation in the federal courts related to the Supply System's default on the WNP 4 and 5 bonds is irrelevant to their assertions in this case. District court judges from states other than Washington were available to hear the cases involved; only Washington state judges could hear the appeal in this case.

This Court has acknowledged that the disqualification of even those judges having direct pecuniary interests in a case is not required where such disqualification would interfere with a court's ability to decide a case. In United States v. Will, 449 U.S. 200 (1980). There, this Court held that the common law Rule of Necessity, consistently applied in both state and federal courts, required the Court to decide the case despite the direct financial interests of its Justices, where the case otherwise could not be heard.

Petitioners were not denied an impartial tribunal in this case.

CONCLUSION

This case does not involve any substantial federal questions. The Petition for Certiorari should be denied for the reasons set forth above.[9]

RESPECTFULLY SUBMITTED this 5th day of April, 1985.

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9 Additionally, the Petition for Certiorari submitted herein by Haberman, et al. should be denied for the reason that the question presented there also fails to raise any substantial federal questions. See footnote 1, supra.

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CLERK

No. 84-1258 (16)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHEMICAL BANK AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, et al.,

Respondents.

BRIEF OF RATEPAYER INTERVENORS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION ADDRESSED

Whether this Court should undertake to review federal questions neither raised nor presented until after the challenged decision was made by the Washington Supreme Court.

PARTIES TO THE PROCEEDINGS

Petitioner Chemical Bank's list of parties to the proceedings (petition at iii - v) omitted numerous ratepayer groups and individuals that intervened as defendants in the proceedings below: Clark County PUD Owners Association; Rollie Wulff; Ed Klump; Pacific County Irate Ratepayers; Leon Lead; Betty Kaskinen; Bill Shanahan; Burke Long; John Gillanders; Bill Gillanders; Gordon Rosier; Louise Saluteen; Concerned Ratepayers of the Tri-Cities; Robert Henry; Larry Caldwell; Matt J. P. Dillon; and Fair Use of Snohomish

Energy (FUSE). This Brief in Opposition is submitted on behalf of these intervenors (hereafter "Ratepayer Intervenors").[1]

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[1]Another group of numerous ratepayers within the service area of respondent City of Ellensburg also intervened below as defendants, represented by their own counsel.

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STATEMENT OF THE CASE

The Ratepayer Intervenors comprise individuals and groups within the service areas of seven of the respondent utilities.[2] One of these utilities, P.U.D. No. 1 of Snohomish County, was the largest single participant in WNP 4 and 5, having subscribed to more than 13 percent of the project capability.

While Petitioner and numerous amici stray far from the record to speculate (and perhaps exaggerate) about the consequences of default to the bondholders, they studiously ignore the severe consequences that would be inflicted upon the

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[2]These are: Public Utility District No. 1 of Clark County; Public Utility District No. 2 of Pacific County; Public Utility District No. 3 of Mason County; Public Utility District No. 1 of Klickitat County; Public Utility District No. 1 of Snohomish County; Public Utility No. 1 of Benton County; Public Utility District No. 1 of Franklin County.

ratepayers of Washington and the Northwest, if Chemical Bank's claims are upheld. Ignored also is Chemical's effort to shift these burdens from the bondholders, including the numerous corporations and affluent individuals who purchased the bonds voluntarily and continue to engage in speculation trading on them even to this day, to ratepayers who never were afforded a choice of investment in a project undertaken in violation of their own state law.

While the identities of the bondholders and the alleged severity of consequences to them can only be guessed at,[3]

[3] See Petition at 8-9 & n.5. See also Brief Amicus Curiae of the American Association of Retired Persons at 2-3. While Chemical acknowledges that because the bonds are bearer bonds and therefore "precise information concerning the number of bondholders, their identity, the amount of their holdings, and the like, is unavailable," petition at 8 n.5, it nevertheless offers its own "estimates" on these points without citation to the source of these "estimates."

the severe impact of the alleged obligation to ratepayers who never opted for the projects and who will obtain no electricity or other benefit from them is readily seen. Using official data setting forth each participant's share of the alleged debt and the number of ratepayers served by that participant, the Ratepayer Intervenors calculated that each of the 7,637 ratepayers served by P.U.D. No. 1 of Klickitat County would be required to pay $9,034. Similarly, the 142,751 ratepayers served by P.U.D. No. 1 of Snohomish County in 1980 would be required to pay an average of $6,430 <u>each</u> to retire an alleged debt of 918 million dollars. The average debt per ratepayer in the other service areas affecting these intervenors ranges from $3,995 (for each of the 17,019 ratepayers of P.U.D. No. 3 of Mason County) to

$8,688 (for each one of 79,764 ratepayers of P.U.D. No. 1 of Clark County).[4]

ARGUMENT

There Is No Substantial Federal Question

While emphasizing the amount of money at issue and its personal vendetta against the Washington Supreme Court, Chemical Bank conveniently overlooks its own role in bringing about a final judgment that invokes no substantial federal question. Chemical filed this action in King County superior court,[5] seeking no relief other

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[4]This data was set forth in the Memorandum in Support of Motion of [Ratepayer Intervenors] for Leave to Intervene, at 3-5 (filed Sep. 3, 1982). Neither Chemical Bank nor any other party ever challenged these data throughout the litigation.

[5]In view of Petitioner's unprecedented and vehement ad hominem attack against the Washington Supreme Court, it bears emphasis that Chemical chose that forum from a wide choice of fora available to it, including any of numerous federal district courts (based on diversity jurisdiction) and the state courts of Oregon, Idaho, and Wyoming.

than a declaratory judgment. The issues raised in support of the declaration of liability were based exclusively on state law, as were the defenses urged by the several utilities said to be liable.

The only parties raising federal questions, in the pleadings or otherwise, were the Ratepayer Intervenors who contended that the application of the hell-or-high-water clauses (described to this Court as "unconditional 'dry hole' commitments")[6] worked a denial of procedural and substantive due process upon ratepayers confronting astronomical rate increases (up to nine thousand dollars per person) to cover the project failures.[7]

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[6]Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae of Salomon Brothers Inc., et al., at 3.

[7]Answer of Intervenors at 3 (Affirm. def. ¶ 5) (filed Sep. 3, 1982). The Ratepayers also advanced several state law theories

(Cont. on p. 6)

Having lost in the forum of its choosing on the theories it preferred, Chemical reargued all the basic state law issues in its Motion for Reconsideration, briefly mentioning "impairment of contract" and "due process" on pages 43 and 44 just before the "Conclusion." This was enough to draw a cryptic "no taking occurred" on the last of some fifty pages devoted to the dispute by the Washington Supreme Court. Chemical Bank v. WPPSS, 102 Wn.2d 874, 912 (1984). It is this cursory allusion to federal law that is said to substantiate the propriety of this Court rushing to intervene at the prelim-

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7 (Cont. from p. 5)

in opposition to Chemical's claims, asserting that "the participants did not have lawful authority to enter into the agreements," id. ¶ 6, and that the agreements were "void and unenforceable because they are unconscionable." Id. ¶ 7.

inary stages of what promises to be decades of litigation.

Petitioner freely concedes that it did not raise the constitutional question until after the Washington Supreme Court's first decision rejecting Chemical's state law claims. Petition at 10. Chemical belatedly has argued its taking claim, but to this date never has sought leave to amend its complaint to define and present the issue now claimed to be dispositive. Usually such belated argument is insufficient to invoke this Court's jurisdiction. See, e.g., Jones v. Hildebrant, 432 U.S. 183 (1977).

Indeed, it now is obvious that it was Chemical's strategy from the start to present only its state law claims in this declaratory judgment action. When those claims failed, Chemical filed a massive

complaint in federal court raising federal securities claims and other federal issues; it is clear that this action was not a last minute desperation effort in the wake of an "unexpected" decision by the Washington Supreme Court, as Chemical asks this Court now to believe. Instead, it now appears that Chemical has had second thoughts about the wisdom of its original strategy, and asks this Court to rescue it from its failure to plead its case properly below.,

To support its effort to have the Court overlook the untimeliness of the constitutional claim, Chemical advances the fiction that it was the Washington Supreme Court that "took" the bondholders' property by rendering a decision so "unexpected" as to deprive the bondholders of their reasonable, investment-backed

expectation. See, e.g., Petition at 4, 9-10, 14, 22.

The decision perhaps was unexpected to Chemical, because Chemical apparently neglected to read the answers and briefs of the Participants (and these Ratepayers) contending that the contracts were unauthorized (see footnote 7, supra), as well as the numerous authorities cited by the Washington Supreme Court for the well settled proposition that unauthorized, ultra vires acts by government entities are null and void. Indeed, the proposition itself is hardly novel; a plethora of cases (admittedly involving lesser sums) recognize that it is essential for the protection of an unsuspecting public to prevent the execution of unauthorized contracts, regardless of the equitable theories invoked to evade this basic principle.

In an extensive and thorough discussion, 102 Wn.2d at 900-12, the Washington Supreme Court recognized that allowing equitable relief would nullify the public protection afforded by the ultra vires rule, by allowing equity to accomplish what otherwise could not be done (i.e., the execution of unauthorized contracts).[8]

Chemical's effort to excuse its failure to plead constitutional claims by attacking the Washington court's decision is so transparent that not even its amici have adopted it. Instead, they recognize that the true essence of any constitutional claim is against the project's

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[8] Chemical emphasizes that everyone ("participants, their counsel, and independent bond counsel") asserted that authority existed, Petition at 20-21, a point emphasized by the Washington Supreme Court as well. 102 Wn.2d at 899. These assertions are grist for the mill of Chemical's securities suit, where ultra vires and other state law defenses presumably will not bar recovery.

participants. See Motion for Leave etc. of Salomon Brothers, et al., supra at 1 (repudiation by Washington utilities "effected an uncompensated taking"); id. at 7; id. at 12 ("the actions of the Participants ratified by the Washington Supreme Court give rise to a 'taking' in the present case"). When properly cast in this manner, it becomes clear that the decision of the court, no matter how unexpected, does not excuse Chemical's failure to plead and argue ab initio that the alleged repudiation by the participants was a taking. Particularly where a massive securities lawsuit is well underway toward resolving the claims of misrepresentation and fraud that are the essence of Chemical's grievance, this Court should decline the invitation to address a claim of constitutional error invited by the Petitioner's own litigation strategy.

No Taking Has Occurred

This Court has pointed out that any analysis of the Taking Clause requires an "essentially ad hoc, factual" inquiry. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). On more than one occasion this Court has declined to be drawn into the resolution of takings claims on records more instructive than the present one. Agins v. Tiburon, 447 U.S. 255, 260 (1980); see Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-97 (1981); Hodel v. Indiana, 452 U.S. 314, 334-35 (1981).

This Court stated in Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra at 295:

> These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

But these critical factual elements are lacking here. There is no identification of the "specific property" alleged to be taken; "estimates of economic impact" are spun out of whole cloth by Chemical for the first time in its Petition for Certiorari, id. at 8-9 & n.5, and without citation to the source of the estimates (even one outside the record); and there is no evidence regarding the "ultimate valuation" of bonds that continue to be the subject of active trade.[9]

A trial on a taking theory properly presented could have focused on the nature

[9] See also Andrus v. Allard, 444 U.S. 51, 64-65 n.21 (1979) ("The timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations. . ."). The record does not indicate, nor has Chemical stated, how many bondholders acquired their interest after this litigation began and after the Washington Supreme Court's decision. Nor is there information regarding the amounts already paid as interest to bondholders, the current purchase price of the bonds, or their current fair market value.

of the claimed property right and its asserted impairment. That this did not occur is the result of Chemical deliberately bypassing the federal theories it must assert to gain this Court's attention.

It is of course indispensable to the success of a takings claim that the property said to be the subject of the divestiture be clearly specified. See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., supra at 295. The bondholders still have the tangible manifestations of their investment, bonds which to this day remain the objects of active trade and negotiation. See Andrus v. Allard, 444 U.S. 51, 65-67 (1979) ("In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." Held: no taking,

despite recognition that Act prevented most profitable use of property).

It appears from the submissions that the "property" said to be taken is the "unconditional 'dry hole' commitment" received as the security. See, e.g., Petition at 16. But as this Court repeatedly has recognized:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972), quoted with approval in Texaco, Inc. v. Short, 454 U.S. 516, 525 (1982).

It is clear that states have considerable discretion to define protected "property" and to adjust remedies in the face of claims of clear economic loss.

Texaco, Inc. v. Short, supra at 526, 528-33; Memphis Light, Gas & Water Division v. Craft, 437 U.S. 1 (1978). See also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) (sustaining over constitutional objection liability limits in the Price-Anderson Act). To the ratepayers, the proposed "dry hole" entitlement is an outrageous and unconscionable imposition that can be rolled back without compensation no less than the spillover easements commonly associated with pollution law.

Petitioner and amici rely heavily on Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) to establish that interest (as well as principal) is protected property that may not be confiscated by a judicial declaration that the property never existed in the first place.

But in Webb's the property interest was defined clearly at the outset in a proceeding brought for the very purpose of addressing the taking issue. See Motion for Leave etc. of Salomon Brothers et al., supra at 11 ("The receiver thereon brought a proceeding . . ."). No clear definition of the property interest here was provided by Chemical in its belated pleas to the Washington Supreme Court.[10]

The property at issue in Webb's was

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[10] Chemical and its amici continue to have difficulty in defining the proper alleged to be taken. Is it the participants' "repeated assurances," petition at 16, the "benefit of their bargain," id., the principal invested by the bondholders, id. at 16, 18, the failure of participants to make restitution, id. at 19-21, or is it the refusal of the Washington Supreme Court to rule in accordance with the Petitioner's demands (id. at 21-22)? Or did a "chorus of State assurances" establish "reasonable investment-backed expectations" on the part of the bondholders? See Motion for Leave etc. of Salomon Brothers, et al., supra at 14 (emphasis in original).

the interest that could be earned on the funds deposited into court. This Court's decision merely recognized that the interest must be viewed as private property, state statutes and judicial pronouncements notwithstanding. 449 U.S. at 164. Here, no post hoc statute or decision has altered the nature of the bondholders' property; the court determined that there was no authority to enter the contracts on the basis of statutes in place when the unauthorized actions were taken. Here, no property was confiscated because the participants never had authority to enter into the unconditional dry-hole commitments that Chemical now asserts have been taken. Chemical's theory seems to be that any judicial rejection of a due process claim itself becomes a taking if the decision is contrary to the claimant's expectation.

CONCLUSION

This is a big case, but at this point it is not a constitutional one. Nowhere does Petitioner's invective sound more harshly than in its concluding pleas about "public morality and trust in government." Petition at 28. But this case is about state laws and ultra vires actions, not about constitutional issues Chemical deliberately bypassed throughout the proceedings below. This Court should resist the unprecedented pressures of the financial community to transform this case into something it is not and never has been, and should deny the petition for certiorari.

DATED this 5th day of April, 1985.

Respectfully submitted,

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Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' OPPOSITION TO UNDERWRITERS' AND PUBLIC SECURITIES ASSOCIATION'S MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

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April 5, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

This is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Central Electric Cooperative, Inc.

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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COLUMBIA RESPONDENTS' OPPOSITION TO UNDERWRITERS' AND PUBLIC SECURITIES ASSOCIATION'S MOTIONS FOR LEAVE TO FILE BRIEFS *AMICUS CURIAE*

This response is submitted pursuant to Supreme Court Rule 42.4 in opposition to (1) the Motion For Leave To File Brief *Amicus Curiae* of Salomon Brothers Inc.; Smith Barney, Harris Upham & Co. Incorporated; Prudential-Bache Securities Inc; and Merrill Lynch, Pierce, Fenner and Smith, Incorporated ("Underwriters") and (2) the Motion For Leave To File Brief *Amicus Curiae* of the Public Securities Association ("Association").

The seventeen respondents submitting this response are listed on the inside front cover. They are rural electric cooperatives located in Washington, Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Reasons For Denying The Motions For Leave To File *Amicus* Briefs

We are aware that a motion for leave to file an *amicus* brief in support of a petition for certiorari is normally granted notwithstanding Supreme Court Rule 36.1, which provides that such a motion "is not favored." Nevertheless, we urge the Court to deny the Underwriters' and Association's motions in this case, on the ground that their proposed briefs *amicus curiae* so distort the facts and the record that they constitute an abuse of the proper function of an *amicus*.

In their effort to create federal constitutional issues in a case where none exists, the Underwriters and the Association seek permission to tell the Court in their proposed briefs about municipal utilities who borrowed money from bondholders, repeatedly gave assurances of repayment, and

then refused to return the money they borrowed, and about a state supreme court which suddenly breached the rule of *stare decisis*, redefined state law and held that the bondholders were not entitled to repayment on their bonds. Such a tale has no similarity to the facts of this case.

Here, the participant utilities did not issue the bonds, WPPSS did; the participants did not receive any part of the bond sale proceeds, WPPSS did; the participants made no representations about their authority to the bondholders and gave the bondholders no assurances of repayment, WPPSS and its bond counsel did; and because the participants received no money or anything else of value from either the bondholders or from WPPSS in connection with the two failed nuclear projects, the participants have nothing to "return" to the bondholders.

WPPSS was not "conceived, designed, and employed as nothing more than a conduit on behalf of, and for the convenience of, the participants." (Association Brief at 12). WPPSS was established in 1957, had completed a hydroelectric project and a nuclear generating plant in the 1960s, and had already undertaken the construction of three other nuclear projects, with financial backing from the Bonneville Power Administration, long before 1976 when the Participants' Agreement from Projects 4 and 5 was signed. WPPSS employed more technical and administrative personnel on its own staff than some of the rural and small-town participants had ratepayers.

Despite all the invectives they hurl at the Washington Supreme Court, nowhere do the Underwriters or the Association cite any prior Washington decision which was overruled, either expressly or implicitly, by the court in reaching the two decisions that, *amici* would tell this Court, so drastically changed state law. Moreover, the Washington

Supreme Court did not invalidate the bonds or deprive the bondholders of their right to receive payment from WPPSS; rather, the court held unenforceable, under longstanding principles of Washington law, the power supply agreement between the participant utilities and WPPSS. Neither WPPSS nor any Washington court has ever suggested that WPPSS is not fully liable to the bondholders on the bonds WPPSS issued.

Zealous advocacy is one thing; distorting the facts and mischaracterizing the record is quite another. Neither is appropriate for an *amicus curiae*. As one court has stated,

> "an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another . . . . Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an *amicus* brief is to be denied, in keeping with the principle that an *amicus* must be a friend of the court and not a friend of a party to the cause."

Leigh v. Engle, 535 F.Supp. 418, 420 (N.D. Ill. 1982). Another court has pointed out that an *amicus* is one who for the assistance of the court gives information on some matter of law, not one who gives a "highly partisan" account of the facts. *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979). By those standards, neither the Underwriters nor the Association qualifies as an *amicus curiae* in this case.

We urge the Court to send a signal to the bar that the role of *amicus curiae* should not be abused as the Underwriters

and the Association would abuse it here. Their motions for leave to file *amicus* briefs should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM

Petitioners,

—v.—

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BENTON COUNTY, WASHINGTON, *et al.*,

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TO THE SUPREME COURT OF THE STATE OF WASHINGTON

OREGON PUDs' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Washington Supreme Court retroactively manipulate state law in a sudden, unjustified and arbitrary departure from all precedent to redefine state law remedies and rights, causing an unconstitutional taking of property rights, when it invalidated municipal contracts which circumvented existing enabling statutes incorporating public protections against the very liabilities incurred?

2. Did the Washington Supreme Court deny Petitioners notice and opportunity to protect their rights, when, without a factual hearing, it made rulings as a matter of law based upon the plain terms of a contract?

3. Did the Washington Supreme Court deny Petitioners an impartial forum because two justices (one in the majority and one in the dissent) lived in areas serviced by utilities involved in the proceedings?

PARTIES TO THE PROCEEDINGS

The Petition for Certiorari sets forth the numerous parties to this proceeding. This Brief in Opposition to Petition for Certiorari is submitted by Respondents Central Lincoln People's Utility District, Clatskanie People's Utility District, Northern Wasco County People's Utility District and Tillamook People's Utility District (referred to in proceedings below and herein as "the Oregon PUDs").

None of the four Oregon PUDs has any subsidiaries or other affiliates. The Oregon PUDs are unaware of any subsidiaries or other affiliates of other parties.

STATEMENT OF THE CASE

The Oregon PUDs generally adopt the Statement of the Case of the Nine Defendants' Brief in Opposition to Petition for Certiorari, with the following additions.

Petitioners lump all respondent participants together. To the contrary, the participants are 88 separate and distinct utilities with differing interests, relationships and positions. The four Oregon PUDs are not, have never been, and cannot under Oregon law become members of the Washington Public Power Supply System (hereinafter "Supply System"). Nor, contrary to Petitioners' unilateral assertions, have they authorized the Supply System to act as their agent in connection with the Supply System's Nuclear Projects 4 and 5. Their relationship with the Supply System in these projects, as was the case with a number of other respondents, was simply that which was created by the terms of the now void Participants' Agreements with the Supply System in which they were to purchase a percentage of the project capability of the plants to be owned, financed and constructed by the Supply System.

Likewise, the Oregon PUDs did not "supervise" the Supply System's construction and expenditure of funds as asserted by Petitioners. As noted by the Washington Supreme Court and the Oregon Supreme Court as well, the participants, as purchasers of project capability from the plants, were afforded only limited rights on Supply System proposals on specified subjects. If within 15 days 20 percent or more of the participants (by percentage share of project capability purchased) determined that the Supply System proposal did not comport with "prudent utility practice," they could object and have an independent consultant determine if indeed the Supply System proposal departed from prudent utility practice.[1] No participant, and not even a group of participants acting collectively, if their total shares represented less than 20 percent of the project capability purchased,[2] could object to a Supply System proposal even if, in its opinion, the proposal did not comply with prudent utility practice. And proposals by the Supply System within the parameters of prudent utility practice could not be objected to by one or even all 88 of the participants, even if some or all of the participants would have, if they were the project owners,

[1] The consultant could not adopt a Participants' proposal even if he determined the Participants' proposal was preferable unless he determined that the Supply System violated prudent utility practice. Participants' Agreements, § 15(f).

[2] Even collectively, the Oregon PUDs represented only approximately four percent of the project capability purchased.

selected another approach for efficiency, safety or any other reasons. The Supply System independently had the right to control the details of the work, to hire and fire its employees and consultants, and to operate as a separate and distinct entity free of supervision and management by the Oregon PUDs.

One also might get the impression from the Petition that the first case filed to challenge the authority and obligations of any participants in the projects was filed by certain cooperatives after the Supply System terminated construction of Nuclear Projects 4 and 5. That is not so. Prior to termination of the projects, an Oregon ratepayer filed an action in Oregon state court contesting the authority of his utility to enter into its Participant's Agreement with the Supply System. (*DeFazio v. Washington Power Supply System, et al.*, No. 16-18-11344, Circuit Court for Lane County, Oregon, filed December 22, 1981). That ratepayer litigation raised issues common to all the Oregon municipal and PUD participants, necessitating their intervention in the litigation. Additional ratepayer groups also intervened.

Prior to the Washington Supreme Court's first ruling on the authority of Washington municipalities and PUDs to enter into their Participants' Agreements with the Supply System, the *DeFazio* litigation resulted in a trial court ruling that the Oregon PUDs and other Oregon municipal entities lacked authority to enter into their Participants' Agreements with the Supply System, and that those Agreements were void *ab initio*. The Oregon Supreme Court subsequently reversed that trial court ruling in *DeFazio v. Washington Public Power Supply System*, 296 Or. 550, 679 P.2d 1316 (1984) (Appendix G to the Petition for Certiorari), a decision applauded by Petitioners.

Interestingly, the decision by the Oregon Supreme Court that the Oregon public participants had authority to enter into the Participants' Agreements with the Supply System was premised on a number of legal conclusions that directly contradict positions now adopted by Petitioners in their attempt to create federal constitutional issues in this case. For example, Petitioners now contend that the Supply System was merely the

"participants' instrumentality," and that the participants "acted through the Supply System," which was merely a conduit for them. (See, e.g., Petition for Certiorari at 4-5). If so, then the Oregon public participants would have lacked authority. *See DeFazio v. Washington Public Power Supply System* (Appendix G to the Petition for Certiorari at G-15-19). The Oregon Supreme Court, however, concluded as a matter of law that the Supply System was not an instrumentality or conduit of the Oregon public participants. Also directly contrary to assertions now made by Petitioners, the Oregon Supreme Court rejected as a matter of law arguments that the Oregon entities were issuers of bonds or borrowers of funds, directly or indirectly, in connection with Projects 4 and 5 (G-43), and that the Oregon entities managed and controlled the Supply System (G-19). These legal conclusions by the Oregon Supreme Court were essential to its decision, which was certainly embraced by Petitioners, and Petitioners cannot now disregard those rulings to argue that the Washington Supreme Court was arbitrary in reaching the same legal conclusions.

Petitioners further suggest, without support, that while bondholders did bear some risks, *e.g.*, insolvency, they did not bear the risk that the contracts between Participants and the Supply System were *ultra vires* and void. As discussed further herein, that bold assertion is simply contrary to all law on the subject and flies in the face of the very essence of the *ultra vires* doctrine with respect to public contracts. Indeed, the Official Statements and the bonds themselves warned potential bondholders that enforceability of the Participants' Agreements may be subject to "judicial discretion,"[3] and bond counsel was retained to render

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[3] The Official Statements prior to the 1979B series warned that "the obligations of the parties to said Participants' Agreement. . . and the enforceability thereof under the same may be subject to general principles of equity which permit the exercise of judicial discretion and to valid bankruptcy, insolvency, reorganization, moratorium and other laws for the relief of debtors."

In the Official Statement for the 1979B series and thereafter, bond purchasers were warned that enforceability of the Participants' Agreement was subject to "judicial discretion, the valid exercise of sovereign police powers of the State of Washington, and of the constitutional powers of the United States of America, and valid bankruptcy, insolvency, reorganization, moratorium and other laws affecting creditors' rights."

The same warning appeared on the bonds themselves.

an opinion to prospective bond purchasers on the authority of the participants. The law and facts both belie Petitioners' unsupported assertion.

Petitioners assert that the type of financing used here has become an accepted means of financing projects such as this. They neglect to mention, of course, the fact that other states utilizing this financing method have adopted very particular enabling statutes geared to that specific type of financing.[4] Washington has no such enabling statute.

Finally, Petitioners mischaracterize the Washington Supreme Court's decision. Many of the inaccurate characterizations will be dealt with below. In particular, Petitioners assert that to their detriment the Washington Supreme Court fabricated a new "control test" for determining authority. Actually, the "control" test articulated by the Washington Supreme Court was an expansion of existing law to Petitioners' benefit. Having concluded that it had never before expanded municipal authority

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[4] As the Washington court noted in *Chemical Bank I:*

Some states have provided statutory authority for such unconditional guaranties and courts have recognized the validity of projects developed under those provisions. *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982). That recognition, however, is based upon very explicit statutory authority. South Carolina's "Joint Municipal Electric Power and Energy Act" provides an example:

> Any municipality which is a member of the joint agency may contract to buy from the joint agency power and energy required for its present or future requirements, including the capacity and output of one or more specified projects. As the creation of a joint agency is an alternative method whereby a municipality may obtain the benefits and assume the responsibilities of ownership in a project, *any such contract may provide that the municipality so contracting shall be obligated to make the payments required by the contract whether or not a project is completed, operable or operating notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of a project or the power and energy contracted for,* and that such payments under the contract shall not be subject to any reduction, whether by offset or otherwise, and shall not be conditioned upon the performance or nonperformance of the joint agency or any other member of the joint agency under the contract or any other instrument.

(Italics ours.) S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982). Several other states have similar statutes. Mass. Ann. Laws, ch. 164A, § 3(b) (Law. Co-op. 1979); Me. Rev. Stat. Ann., tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981); Vt. Stat. Ann., tit. 30, § 604 (Supp. 1982). This state has no such statute.

Chemical Bank v. Washington Public Power Supply System, 99 Wash. 2d 772, 786, 666 P.2d 329 (1983) ("Chemical Bank I")

for this type of transaction beyond situations where *actual* ownership existed, the Washington Supreme Court then expanded those parameters of municipal authority to include situations where participants had all the *rights of control* incident to ownership. Petitioners also claim the Washington Supreme Court treated the "control" issue as a factual one. It is clear from the face of the opinion itself that the test was one of a legal *right* of control under the terms of the agreements. Indeed, only such a legal test based upon the *right* of control could be applied at the time a municipal contract is entered into. The court then determined as a matter of law from the plain terms of the agreement that participants were not given the legal rights of control that would be incident to ownership of the Projects.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to grant certiorari to review certain rulings by the Washington Supreme Court under Washington law. The Washington Supreme Court ruled that agreements between the Supply System and 88 public and cooperative utilities were void and unenforceable against the Washington cities and utility districts under the state's *ultra vires* doctrine, and that, as a result, the agreements were also unenforceable against the rest of the participants under state contract law principles of mutual mistake and frustration of purpose. Petitioners claim these rulings by the Washington Supreme Court constituted a "taking" of property without just compensation and denied them procedural due process.

In evaluating whether the petition raises any significant federal constitutional questions, it is important to keep in close perspective just how petitioners even purport to raise federal constitutional questions in the context of these purely state law issues.

At times, it appears that Petitioners attempt to challenge the constitutionality of a state court's voidance of a municipal contract by application of the time-honored *ultra vires* doctrine, or by application of contract principles of mutual mistake and frustration of purpose. They certainly devote considerable effort to attempt to influence this Court that it would be unfair

in any such circumstances to deprive the bondholders of their investment.[5] And they recite by rote factors articulated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155 (1980), as if these factors would apply to judicial decisions interpreting these basic concepts of municipal and contract law. However, a closer reading of their Petition reveals that technically they couch their constitutional argument in other terms, as indeed they must. Their constitutional claims hinge on whether the Washington Supreme Court suddenly and arbitrarily departed from clear precedent to redefine contract rights and remedies under state law, or whether the Washington Supreme Court unconstitutionally denied them a factual hearing or an impartial forum.

They must so frame their constitutional arguments for obvious reasons. The doctrines of *ultra vires*, mutual mistake and frustration of purpose are principles of municipal and contract law long accepted and embodied in every contract with a municipal entity.[6] Therefore, the fact that municipal contracts

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[5] For example, Petitioners discuss the cost of power in the Northwest and attempt to characterize the bondholders as a group of individuals with small investments for retirement income. *See* Petition for Certiorari at 8n.4 & 9. These assertions have no purpose in the petition other than to attempt to influence this court to rule on the petition on bases other than the claimed constitutional issues involved.

[6] This Court has long recognized that purchasers of municipal bonds

> "Are charged with notice of the laws of the state granting power to make the bonds that they find on the market. This we have always held. If the power exists in the municipality the bona fide holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created."

Northern National Bank v. Trustees of Porter Township, 110, U.S. 608, 618 (1884), quoting *Anthony v. County of Jasper*, 101 U.S. 697 (1880); *Accord Barnett v. City of Denison*, 145 U.S. 135, 139 (1892); *Moore v. City of Nampa*, 276 U.S. 536, 541 (1928).

This is certainly the law in Washington, *Minish v. Hanson*, 64 Wash. 2d 113, 390 P.2d 704 (1964); *Noel v. Cole*, 98 Wash. 2d 375, 379, 655 P.2d 245, 248 (1982), and throughout the field of municipal law. *See* 10 McQuillin, *The Law of Municipal Corporations*, §§ 29.04, 29.104c (3d ed. 1981). RCW 62A (UCC) § 8-202, Comment at ¶ 6. *See also*, 1 *Williston on Contracts*, § 220B (3d. ed. 1957):

> Holders of municipal bonds are held in law to know, and are chargeable with constructive knowledge of, constitutional and statutory provisons bearing on the authority to issue bonds. Therefore, though negotiable in form, such bonds are subject to certain defenses, as for instance that the issue is *ultra vires* and therefore void even in the hands of an innocent holder.

may be voided by a state's court under state law does not itself raise any constitutional issue. And here in particular, the fact alone that bondholders lost most of their money invested in revenue bonds because the issuer (the Supply System) did not obtain the expected operating revenues from invalidated and unenforceable project agreements simply does not raise a constitutional issue, no matter how much money may be involved. Perhaps for this reason Petitioners never even raised a constitutional question in the state court proceedings (although defenses of *ultra vires*, mutual mistake and frustration of purpose were raised in numerous respondents' answers and counterclaims) until *after* the Washington Supreme Court decided that the Washington cities and PUDs lacked authority.

Moreover, Petitioners cite no case which would apply by rote the factors articulated in *Penn Central* and *Webb's* to a judicial decision interpreting close and unresolved issues of state contract law to determine that the decision amounted to an unconstitutional "taking" of "property." Rather, the cases relied on by petitioners involve confiscation or restriction of the use of property in contravention of prior and clearly established property rights.

If any constitutional issue were involved here at all, it could not be based on the fact that a state court, through application of state municipal and contract law, invalidated municipal contracts. Petitioners must argue that the state court did not apply state law, but invalidated the contracts and denied them all legal and equitable relief by manipulating and deviating from established state law to redefine suddenly and arbitrarily Petitioners' rights and remedies, or by deciding disputed questions of fact without a hearing. That is the argument they have to make. And in order to make it here, they have to mischaracterize the Washington Supreme Court opinions. A reading of the opinions alone demonstrates that no substantial federal question is raised.

THE WASHINGTON SUPREME COURT DID NOT "TAKE" PROPERTY RIGHTS OR DENY PROCEDURAL DUE PROCESS

1. *The Washington Supreme Court's Decision Did Not Manipulate State Law and Retroactively Depart from All Precedent to Arbitrarily Redefine Pre-Existing Property Rights.*

Admittedly, the authority issues presented for decision by the Washington Supreme Court were close and difficult legal issues. As is frequently the case in our complex legal system, attorneys (and judges) could and did disagree on what should be the outcome. But the fact that a case presents a close question of application of existing principles of law to new and unique factual circumstances does not mean that the losing side of the case is unconstitutionally denied property rights. If that were the case, this Court would be besieged with petitions for certiorari every time a state court decided a close case or case of first impression.

At best for Petitioners, it could be said that prior to the ruling by the state court on the issue, the authority of the Washington public participants was inconclusive. Petitioners seem to seek some solace or claim some constitutional protection by reason of the Respondents' belief that they had authority to enter into the Participants Agreements. However, it is hard to conceive that a municipality would enter into a transaction thinking it lacked authority.[7] Surely in virtually every instance in which the *ultra vires* doctrine has been applied to void municipal contracts, the municipal officials believed and represented, either expressly or impliedly, that they were entering into valid contracts. That belief is irrelevant to the question of whether in fact they had authority to do what they did. Under the *ultra vires* doctrine, the public interest demands that the public not be

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[7] Petitioner Chemical Bank and a class of bondholders seem to be making precisely this contention in their federal securities action instituted against respondents and others. *In Re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash., consolidated and transferred August 5, 1983). Although these respondents deny that Chemical and the class of bondholders have stated a claim and believe there is no merit whatever to such allegations, the federal securities action would be the proper forum to pursue these claims of misrepresentation. Such allegations have nothing to do with whether a constitutional question is raised here.

bound or subject to contractual liability for acts of municipal officials in excess of their authority.[8] If the public were so bound, the *ultra vires* doctrine would be meaningless and the public defenseless.

A review of the Washington Court's decisions in *Chemical Bank I* and *Chemical Bank II* reveals that the legal issues, although perhaps close and difficult, were carefully analyzed by the court in view of the applicable statutes and case law and the unambiguous provisions of the Participants' Agreements. Although the court's decisions may have displeased Petitioners and others, they have no basis whatever for asserting that the decisions retroactively redefined their property rights.

In *Chemical Bank I* a Washington court was asked to decide whether the Participants' Agreements were within the statutory authority of the Washington participants. *Chemical Bank v. Washington Public Power Supply System*, 99 Wash. 2d 772, 781, 666 P.2d 329 (1983) ("Chemical Bank I"). The court's analysis of the validity of the agreements was based upon an examination of Washington statutes authorizing the purchase of electricity, the acquisition or construction of generating facilities, joint operating agencies and joint development of energy generating projects. 99 Wash. 2d at 782. The court first examined statutes authorizing Washington cities and utility districts to buy electricity, and found that the Participants' Agreements were not simply an authorized purchase of electricity because they provided for an unconditional obligation to pay even if no electricity was ever produced. 99 Wash. 2d at 784. The court then examined statutes permitting municipalities to build or buy their own plants, and found that such statutes required an ownership interest and all the rights and protections incident to ownership. 99 Wash. 2d at 785. The court acknowledged that some states provide explicit statutory authority to purchase energy capacity whether or not energy is produced, 99 Wash. 2d at 786, but noted that the Washington legislature had never

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[8] The purpose of the *ultra vires* doctrine as applied to governmental actions is to "protect the citizens and taxpayers... from unjust, ill-considered or extortionate contracts, or those showing favoritism." *Noel v. Cole*, 98 Wash. 2d 375, 378-9, 655 P.2d 245 (1982), *quoting* 10 E. McQuillin, *Municipal Corporations*, § 29.02 at 200 (rev. 3d ed. 1981).

granted such express authority, and further noted that the Washington court had never found such authority when the municipalities did not have an ownership interest. 99 Wash. 2d at 785. Although the court could have determined that the absence of any ownership interest automatically made the Agreements unauthorized, it instead considered whether the Agreements could be authorized under the statutes permitting utilities to build or buy their own plants, if the Agreements provided for "sufficient control over the project to constitute the equivalent of an ownership interest." 99 Wash. 2d at 787. However, the court concluded that "several provisions of the agreement limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed." *Id.*

The court next considered statutes permitting the creation of joint operating agencies such as the Supply System, and found that the statutes did not provide for the purchase of electric energy that may not be generated. 99 Wash. 2d at 794. Lastly, the court considered statutes permitting public entities to enter into agreements for joint development of generating facilities, but found that these statutes explicitly required that such entities would have an actual ownership interest in any facility built. 99 Wash. 2d 772.[9]

The Washington court concluded that the participants lacked authority to enter into the Agreements because the Agreements were an elaborate financing arrangement that circumvented the protection provided to the public in existing statutory schemes, stating:

> In the present case, the participants lacked substantive authority to enter into this type of contract because they constructed an elaborate financing arrangement that required the participants to guarantee bond payments irrespective of whether the plant was ever completed; to sur-

[9] The court also considered Petitioners' argument that the Agreements were authorized by the implied powers of municipalities, but rejected that argument based upon Washington law that municipal corporations' powers are limited to those conferred in express terms or those necessarily implied, so that if there is any doubt about a claimed grant of power it must be denied. 99 Wash. 2d at 782.

> render ownership interest and considerable control to WPPSS; and to assume the obligations of defaulting participants. As such, these contracts failed to protect unsuspecting individuals, the ratepayers, represented by the participants. *By choosing such an alternative arrangement in lieu of a statutory scheme that incorporated protections against those very liabilities, the participants exceeded their statutory authority, rendering the contracts* ultra vires.

99 Wash. 2d at 798. (Emphasis added.)

In *Chemical Bank II* the Washington court sustained the trial court's ruling upon remand from *Chemical Bank I* that the lack of authority of Washington participants vitiated the Agreements under the doctrines of mutual mistake and frustration of purpose, and that restitution was unavailable from participants because they received no benefit. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984) ("Chemical Bank II"). A review of the court's decision in *Chemical Bank II* reveals that the opinion was also based upon careful application of existing Washington law to the facts of the case.

In *Chemical Bank II*, the Washington court denied Petitioners' claim for restitution from the participants on the grounds that the participants had received no benefit from the bondholders in connection with participants' agreements with the Supply System. While Petitioners attempt to characterize this ruling as an unforseeable and unjustifiable interpretation of state law, they apparently do not deny that Washington law does not permit restitution from a party which does not receive tangible benefits. *See Hailey v. King County*, 21 Wash. 2d 53, 57, 149 P.2d 823 (1944); *Klinke v. Famous Recipe Fried Chicken Inc.*, 24 Wash. App. 202, 215, 600 P.2d 1034 (1978), *aff'd in part, rev'd in part on other grounds*, 94 Wash. 2d 255, 616 P.2d 644 (1980). Rather, Petitioners rely on the dissent's argument that "it was for the participants' benefit that the plants were being built in the first place." Petition for Certiorari at 20, *quoting Chemical Bank II*, 102 Wash. 2d at 936 (Utter, J., dissenting). In fact, however, any benefit to the participants was at most

intangible and merely anticipatory, and never realized.[10] Respondents had no ownership interest in any tangible benefit provided to the Supply System by the bondholders. Their agreement entitled them only to the provision of electricity, and no electricity has been, or will be, provided. Anticipated benefit to the participants which never materialized cannot be made the basis for restitution, *see Restatement (Second) of Contracts*, § 370, Comment a, Illustration 2, nor can participants be required to "disgorge the benefit" they never received. *See Restatement (Second) of Contracts*, § 344, Comment a (1981).[11]

While Petitioners (and the dissent) might disagree that no tangible benefit was received by participants, the court was required to and did make that ruling in accord with state law. It is, at best, fanciful to suggest that the court's finding that no tangible benefit was received by the participants amounts to a redefinition of the Petitioners' property rights under state law.

Petitioners also contend, in a footnote, that the Court's ruling that the lack of authority of the Washington entities voided the remaining participants' contracts due to mutual mistake and frustration of purpose was a "similar attempt to manipulate state law." Petition for Certiorari at 4n.14. Petitioners base this contention on their own opinion that the participants were not "adversely affected" by the mistake and that the agreements exhibited a "contrary intention" to permitting frustration of purpose because Section 6(d) of the Participants' Agreements provides that payment shall be made "whether or not other participants performed their obligations under the agreement." Petition for Certiorari at 21n.14.

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[10] The Supply System, on the other hand, received tangible funds from the bondholders, and converted those funds into tangible assets. The Bond Resolution gives the bondholders the contractual right to restitution of the Supply System's Project 4 and 5 assets. Petitioner Chemical Bank, acting under the Bond Resolution, has in fact seized Project 4 and 5 funds, and has the right to take control of Project 4 and 5 assets.

[11] Not surprisingly, in seeking to require participants to disgorge a benefit they never received Petitioners advance a theory of restitution that would vitiate the *ultra vires* doctrine. If the opportunity to receive a future tangible benefit required restitution of the value of that opportunity, payment of restitution would be required in the amount of the market value of the opportunity, *i.e.*, the amount the participants agreed to pay under the *ultra vires* Agreements. Such a theory of restitution would, of course, make it impossible to protect the public by refusing to enforce an *ultra vires* agreement. *See Hailey v. King County*, 21 Wn. 2d at 57.

Petitioners' argument is contradicted by Section 6(d), which provides:

> Such payments . . . shall not be conditioned upon the performance or non-performance by Supply System or any other Participant or entity under this or any other agreement or instrument, the remedy for any non-performance being limited to mandamus, specific performance or other legal or equitable remedy.

Section 6(d) provides only that payment shall not be conditioned upon non-performance by another participant "under this agreement." It does *not* provide that payment shall not be conditioned upon the enforceability of the Agreements. In fact, the existence of any obligations under Section 6(d) presumes that the Agreements *are* enforceable, and that non-payment by another participant can be enforced by "mandamus, specific performance or other legal or equitable remedy." Here, non-Washington participants had no basis to obtain "mandamus, specific performance or other legal or equitable remedy" against the Washington public participants whose contracts were void *ab initio*. The court's finding that Section 6(d) did not require payment if the Agreements were unenforceable against a majority of participants was a perfectly reasonable—indeed, the most reasonable—interpretation of the provision.

Finally, Petitioners claim that the court created a new state doctrine requiring the bondholders to seek declaratory judgment or be barred from suing for payment. Nothing in the court's opinion even remotely suggests such a holding. Petitioners' argument appears to be based on the court's comment, in denying Petitioners' estoppel argument, that the bondholders could have sought declaratory judgment. 102 Wash. 2d at 905. That comment was not the basis for denying the estoppel claim; the estoppel claim was denied "because the representations relied upon were representations as to questions of law." 102

Wash. 2d at 095.[12]. In referring to the possibility of declaratory judgment, the court merely noted, *obiter dicta*, one precaution bondholders might have undertaken to protect themselves against the risk.[13]. Again, a reading of the Washington Supreme Court's opinion alone disposes of Petitioners' constitutional claims.

2. *The Washington Supreme Court Did Not Deny Petitioners Procedural Due Process.*

(a) The Washington Supreme Court Did Not Address Any Disputed Questions of Fact.

Petitioners allege that the Washington court's finding of lack of authority was based upon a factual determination that the participants did not exercise sufficient control over the projects to meet the ownership requirement imposed by Washington statutes. To support this allegation, Petitioners grossly mischaracterize the opinion, presenting quotations out of context as evidence that the court considered questions of fact, when the court's opinions emphasize that the finding of lack of control was based on legal interpretation of the Participants' Agreements.

---

[12] Representations of legal authority do not give rise to estoppel. *Finch v. Mathews*, 74 Wash. 2d 161, 169-172, 443 P.2d 883 (1968). Rather, private parties dealing with a governmental agency are charged with notice of the agency's authority. *Noel v. Cole*, *supra*, 98 Wash. 2d at 379; *State, ex rel. Bain v. Clallam County Board of Commissioners*, 77 Wash. 2d 542, 463 P.2d 617 (1970).

As this Court has noted, in denying claims that municipalities can be estopped from denying a substantial lack of authority to issue bonds:

> Not only the courts, but individuals, are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a bona fide purchaser without notice. . . Want of such authority is a fatal objection to their validity, no matter under what circumstances the holder may have obtained them.

Town of South Ottowa v. Perkins, 94 U.S. 260, 269 (1877).

[13] They might have taken other precautions also, such as procure insurance. If bondholders were ill-advised by attorneys or brokers that they would incur no risk, they may pursue their remedies against those advisors.

In phrasing the question of control to be examined, the court in *Chemical Bank I* stated that it would "examine the present agreement to determine whether the participants retained sufficient control over the project to constitute the equivalent of an ownership interest." 99 Wash. 2d at 787. Thus, the question as phrased considered only the Agreements. In answering this question the court relied only upon the Agreements:

> In the present case, *several provisions of the agreement* limit the participants' role in management to an extent inconsistent with control of any facilities acquired or constructed.

Id. (Emphasis added).

In *Chemical Bank II*, after permitting Chemical Bank to reargue the control issue, the court again emphasized that its ruling was based upon analysis of the Agreements. The court stated:

> We recognize that *the agreement* did supply some control but still disagree with the appellants' position that it was control sufficient to protect the interest of [the participants'] ratepayers as contemplated by [Washington] statutes.

102 Wash. 2d 893 (emphasis added). The court expressly rejected Petitioners' assertion that the existence of control was essentially a factual inquiry:

> Moreover, we reject appellants' assertion that the question of ownership control is essentially a factual inquiry. The Participants' Agreement and Pacific Power's Ownership Agreement create the contractual rights of the parties. Interpretation of those agreements is a question of law. *Kelly v. Aetna Casualty and Surety Co.*, 100 Wash. 2d 401, 670 P.2d 267 (1983).

102 Wash. 2d at 894.

It is clear from the court's opinions that it determined the existence of control according to the Participants' Agreements, and that there was no lack of opportunity to be heard on the legal issue of whether the agreements provided sufficient control.

Petitioners also assert that their estoppel claims were denied based on factual inquiry. However, the estoppel claims were denied because the representations relied upon by the bondholders were representations as to questions of law, not questions of fact. *See* Section 1, *supra*, at 15.

(b) Petitioners Were Not Denied an Impartial Tribunal.

These Respondents adopt and incorporate the discussion of this issue by the Nine Respondents and the Washington Public Utilities Group, which establish that Petitioners' assertions of partiality are baseless.

CONCLUSION

Petitioners cannot seriously contend that, if the Washington court correctly applied Washington law concerning *ultra vires* contracts and equitable remedies, they would have a constitutional claim. Rather, Petitioners' claim is and must be based on the assertion that the Washington Supreme Court suddenly and arbitrarily departed from clear precedent to redefine contract rights and remedies under state law. Even a cursory review of the Washington Supreme Court's opinions in *Chemical Bank I* and *Chemical Bank II* demonstrates that Petitioners' claims are based on mischaracterizations of those opinions.

Petitioners have strained to create even the appearance of constitutional issues in this case. However, a real constitutional controversy would be created if this Court were to grant certiorari to review state court decisions applying purely state law in determining contract or property rights. Such review would infringe on the powers of state courts and open the floodgates to wholly new categories of petitions for certiorari.

For these reasons the Oregon PUDs respectfully request that this petition for writ of certiorari be denied.

Respectfully submitted,

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No. 84-1258

IN THE

Supreme Court of the United States

October Term, 1984

CHEMICAL BANK and
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,

Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE STATE OF NORTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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April 5, 1985

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BRIEF FOR THE STATE OF NORTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The State of North Carolina submits this brief as *amicus curiae* in support of the petition. The controversy and doubt that the Washington Supreme Court's decision has fostered threatens the efficient functioning of national credit markets on which this State and its local governmental agencies rely to fund important public projects. More generally, that decision may undercut the shared confidence essential to unfettered trade among the several states. Such confidence would naturally be diminished if local governmental entities could procure funds lent in good faith by citizens of this and other States and then, to protect their own constituents

from increased costs, simply renounce any obligation to repay their loans.

We have studied the opinions of the Supreme Court of the State of Washington in this case. We have also studied the petition for certiorari, the opposition brief of the respondents constituting the Washington Public Utilities Group, and the *amicus curiae* briefs of the American Association of Retired Persons; the American Bankers Association, the New York Clearing House Association, and the Securities Industry Association; the Public Securities Association; Salomon Brothers Inc., Smith Barney, Harris Upham & Co. Incorporated, Prudential-Bache Securities Inc., and Merrill Lynch, Pierce, Fenner and Smith, Incorporated; and the City of Seattle, Washington.

Our review of these papers convinces us that this case presents important Federal issues bearing on the stability and efficient functioning of interstate credit markets and on the due process and property rights of current and potential participants in those markets. We believe this Court should hear and determine those issues.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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April 5, 1985

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL WPPSS 4 AND 5 BONDHOLDERS COMMITTEE IN SUPPORT OF THE PETITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National WPPSS 4 and 5 Bondholders' Committee respectfully moves pursuant to Rules 36.1 and 42 of the Rules of this Court for leave to file a brief annexed hereto as *amicus curiae* in support of the petition for a writ of certiorari.

The National WPPSS 4 and 5 Bondholders' Committee (the "Committee") consists of approximately 25,000 persons throughout the country who purchased bonds representing more than half of the $2.25 billion that the Washington Public Power Supply System borrowed, at the behest and on behalf of respondents herein, to finance nuclear power Projects 4 and 5. The Committee was formed in response to the default on the bonds, an event respondents precipitated by repudiating their contractual obligation to guarantee repayment. The Committee's Executive Board which is composed of representatives from

various regions of the country, seeks to protect and coordinate the interests of former and current bondholders throughout the nation whose funds have been appropriated for respondents' local public use. In the course of these efforts the Committee has pursued as its principal goal an expeditious, equitable and comprehensive resolution of the dispute underlying this case.

In support of its motion the Committee states:

1. While the petitioners have consented to the filing of the attached brief amicus curiae, the Committee has been unable to obtain the consent of all of the respondents.

2. The decision of the Supreme Court of the State of Washington upholding respondents' renunciation of their obligations has operated with drastic effect upon the bondholders. It has denied them not only the benefit of their contractual bargain, but also the return of any portion of the underlying principal they lent in good faith for respondents' public use.

3. As more fully set forth in the attached brief, respondents' conduct and the Washington Supreme Court's startling decisions forced commencement of additional litigation in federal and state court. In a brief filed in opposition to the petition, certain principal respondents have suggested that the pendency of these additional actions is a basis for denial of the writ.[1] Although this Committee supports much of the litigation referred to by the respondents, the Committee has no doubt, and wishes to inform this Court, that the present case is both central and critical to this controversy and the most expeditious vehicle for affording relief to all persons injured by respondents' conduct.

---

[1] Brief of Washington Public Utilities Group in Opposition to Petition for Certiorari ("WPUG Brief") at 2-4. The WPUG Brief was filed prior to the date on which briefs in opposition to the petition were due.

4. For those reasons, the Committee has a vital interest in a review by this Court of the questions presented by the petition.

5. Accordingly, the Committee seeks the opportunity to make its views known to the Court and to assist the Court in its decision on the Petition for a Writ of Certiorari.

Counsel for the Committee hereby request that the Court grant this Motion to File Brief Amicus Curiae.

Respectfully Submitted this 4th day of April, 1985.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL WPPSS 4 AND 5 BONDHOLDERS COMMITTEE IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

The National WPPSS 4 and 5 Bondholders' Committee (the "Committee") consists of approximately 25,000 persons throughout the country who purchased bonds representing more than half of the $2.25 billion that the Washington Public Power Supply System borrowed, at the behest and on behalf of respondents herein, to finance nuclear power Projects 4 and 5. The Committee was formed in response to the default, an event respondents precipitated by repudiating their contractual obligation to guarantee repayment of the bonds. In the wake of that repudiation, the Committee's Executive Board comprised of

representatives from various regions of the country, has sought to protect and coordinate the interests of the former and current bondholders throughout the nation whose funds have been appropriated for respondents' local public use.

As a direct result of respondents' conduct and of the Washington Supreme Court's startling decisions invalidating the security behind the bonds, bondholders and their representatives have been required to commence additional litigation in federal and state court.[1] In a brief filed in opposition to the petition in this case, a principal group of Washington respondents has suggested that the pendency of those actions is a basis for denying certiorari here.[2] In addition, a conditional petition has been filed suggesting some deserving claimants are not represented in this action.[3] In response to these contentions, and in an effort

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[1] The federal lawsuit consolidates several actions alleging securities fraud, among other claims, against a wide variety of defendants. *In Re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash. 1983). One state court action raises claims against the State of Washington based on its participation in the events leading to forfeiture of the bondholders' funds. *Hoffer, et al. v. State of Washington, et al.*, No. 84-2-16459-0 (Super. Ct. King County, 1984). A separate state court action, brought against a wide range of parties (including many defendants in the federal securities case), alleges violations of the Washington state securities laws, negligent misrepresentation and other claims. *Haberman, et. al. v. Washington Public Power Supply System, et al.*, No. 84-2-06452-8 (Super. Ct. King County, Wash. 1984).

Certain actions eventually consolidated in the federal lawsuit were filed while the issue regarding validity of the bonds' security, as vigorously contested by respondents herein, was still pending in the Washington State Supreme Court. But many of the principal claims were raised in response to the Washington Supreme Court's startling resolution that issue, foreshadowing its subsequent denial of all relief.

[2] Brief of Washington Public Utilities Group in Opposition to Petition for Certiorari ("WPUG Brief") at 2-4. The participants comprising the Washington Public Utilities Group hold shares representing approximately 45% of the entire interest in Washington Public Power Supply System Nuclear Power Projects 4 and 5.

[3] Petition for Writ of Certiorari to the Supreme Court of the State of Washington at 24-25 & n.5, *Haberman, et al. v. Chemical Bank and Washington Public Power Supply System, et al.*, No. 84-1414 (U.S. March 6, 1985).

to seek redress of the harm to all persons injured by the conduct of respondents herein, the Committee wishes to emphasize the central and critical importance of the case now presented for review.

ARGUMENT

Respondents' description of additional pending litigation neither detracts from the significance of this central case nor provides any basis for denial of the writ. Instead, that description only serves to highlight the unusual burdens that the federal and state judicial systems will bear as a result of one state's abrogation of the bedrock rules of public commerce and the conconmitant constitutional guarantees of our federal system. The extensive litigation that respondents mention is itself one of the consequences that review of this case would diminish or eliminate.

Moreover, although respondents seek to avoid review by noting other "avenues of relief" that have not yet been "exhausted", they themselves in other fora vigorously contest the availability of any such relief. Indeed, respondents have denied all liability in the federal litigation by contending that the bondholders' injuries were caused solely by the decisions of the Washington Supreme Court. Having portrayed those decisions as the sole cause of injury, respondents should not now be heard to suggest that this Court's review of those decisions is unnecessary.

This Committee is the coordinating supporter of the action that has been brought against the State of Washington and it is a supporter of the federal securities litigation. Yet the committee has no doubt that the present case is central in this controversy and that it presents the most expeditious means of providing comprehensive relief for the injuries respondents have perpetrated.

The Committee wishes to emphasize that such an expeditious and comprehensive resolution is urgently required. Many purchasers relied critically on those bonds to generate fixed income

for retirement purposes; many advanced substantial portions of their life savings on the strength of respondents' unambiguous assurances. Yet respondents have been permitted to simply seize the funds they promised to return, leaving innocent individuals throughout the nation grievously harmed as a result of this appropriation of their savings.[4]

To date, these individuals have been denied the prompt recovery needed to redress the disastrous impact of respondents' conduct on their lives. Unless review is granted by this Court, innocent bondholders will be exposed to protracted actions involving heightened legal burdens. Those burdens add layers of complication to the central issues underlying this dispute, and attenuate prospects for timely relief.

By contrast, the present case directly, clearly and immediately presents the core issues raised by these respondents' conduct. This central case was filed in May, 1982—well before commencement of the federal or other actions that respondents mention—to enforce the primary obligations the abrogation of which caused the bondholders' injuries. Defendants, respondents herein, are the entities most directly responsible for those injuries, they are also the entities who benefitted most directly from the bondholders' loss. This case involves principles of federal constitutional law that were specifically designed to govern the underlying dispute between local public agencies and largely out-of-state lenders who have been divested of their funds. For those reasons this action represents the most expeditious vehicle for affording relief.

Given the centrality of this case, review by this Court would dramatically increase the prospects for a prompt, integrated resolution encompassing the claims of all injured parties. Action by this Court would most probably eliminate the need for

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[4] As more fully set forth in the brief *amicus curiae* filed by the American Association of Retired Persons, many bondholders, due to their advanced age, cannot reenter the work force and thus cannot even begin to rebuild the savings they have lost.

most of the extensive litigation to which this Committee and others have been required to commence and would provide the impetus for disposition of the entire controversy.

The mass of litigation made necessary by respondents conduct and the Washington Supreme Court's surprising decisions thus provides a reason for granting the petition and, in any event, should not be used to justify insulating those decision from review by this Court. That is particularly true in view of the complex and burdensome nature of the additional litigation whose pendency respondents stress. As respondents themselves are required to note, the federal action "was brought against scores of defendants", has resulted in "production of literally tens of millions of pages of documents," and "multi-track depositions are presently in progress". WPUG Brief at 3. The parties and counsel in the federal proceeding alone are so numerous that an entire public school building has been considered for use at the trial site—with its large auditorium serving as the courtroom. The outcome of all of that enormous effort and expenditure of resources remains distant and far from certain.

Those injured by respondents' conduct should not be required to bear such burdens and uncertainties merely to recover funds that were lent in good faith and that respondents are financially able to repay. Those burdens and uncertainties could be substantially lessened, or even eliminated, by review in this Court of the judgment of the Washington Supreme Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully Submitted this 4th day of April, 1985.

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No. 84-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF
BENTON COUNTY, WASHINGTON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

COLUMBIA RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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April 5, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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This Brief in Opposition is submitted on behalf of the following respondents, which for convenience are referred to collectively as the "Columbia Respondents" or "these respondents":

Columbia Rural Electric Association, Inc.

Blachly-Lane County Cooperative Electric Association

Central Electric Cooperative, Inc.

Columbia Basin Electric Cooperative, Inc.

Consumers Power, Inc.

Coos-Curry Electric Cooperative, Inc.

Douglas Electric Cooperative, Inc.

Hood River Electric Cooperative

Lane Electric Cooperative, Inc.

Midstate Electric Cooperative, Inc.

Salem Electric

Umatilla Electric Cooperative Association

Wasco Electric Cooperative, Inc.

Kootenai Electric Cooperative, Inc.

Fall River Rural Electric Cooperative, Inc.

Lost River Electric Cooperative, Inc.

Raft River Rural Electric Cooperative, Inc.

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QUESTIONS PRESENTED

1. Was there an unconstitutional taking of private property when the Washington Supreme Court decided, based on long-standing principles of state law, that Washington municipal corporations lacked authority to enter into an agreement with another Washington municipal corporation (WPPSS) regarding the latter's construction of two nuclear power plants in Washington and that consequently the agreement was unenforceable, where as a result of the unenforceability of the agreement WPPSS may lack sufficient revenues to meet its financial obligations to its bondholders?

2. Did the Washington Supreme Court deprive WPPSS, or holders of municipal revenue bonds issued by WPPSS, of "property" "without due process of law," by deciding that an agreement between WPPSS and the respondent utilities was unenforceable under Washington law, where in reaching its decision the court

(a) relied on the text of the agreement in considering as a matter of law whether Washington municipal corporations had authority to enter into such an agreement under Washington law,

(b) held that the doctrine of equitable estoppel was inapplicable where the representations relied on by the parties invoking the doctrine were as to matters of law not fact, the parties relying on the representations had the same opportunity to determine the truth of the representations as the parties making them, and in opposing entry of summary judgment the parties invoking the doctrine failed to present any evidence, by affidavit or otherwise, of any facts upon which such estoppel could be based,

(c) correctly pointed out that interested parties could have sought a prior declaratory judgment on the validity of the agreement in question, and

(d) disregarded the frivolous contention, raised for the first time after the court had already rendered an adverse decision,

that two of the justices should have disqualified themselves because they resided in areas where electrical service was provided by a respondent utility?

PARTIES TO THE PROCEEDINGS

Petitioner Washington Public Power Supply System (WPPSS) is a type of Washington municipal corporation called a "joint operating agency" consisting of various "members" which are Washington cities and public utility districts. It is a separate corporate body under Washington law. Although the number and identity of its members have changed over the years, during most of the relevant period its members were four cities and nineteen public utility districts in Washington.

Petitioner Chemical Bank is the bond trustee appointed as such under WPPSS Board of Directors Resolution No. 890 (the Bond Resolution) pursuant to which WPPSS issued municipal revenue bonds in the principal amount of $2.25 billion to raise funds for the construction of two nuclear power plants (WPPSS Projects 4 and 5) in Washington.

The 88 respondents named by petitioners consist of 45 municipal corporations (nineteen public utility districts, eight cities, one town and one irrigation district in Washington, four peoples' utility districts and seven cities in Oregon, and five cities in Idaho) and 43 rural electric cooperatives (thirteen in Washington, thirteen in Oregon, eleven in Idaho, four in Montana, one in Wyoming and one in Nevada) which signed a Participants' Agreement with WPPSS relating to the anticipated construction by WPPSS of its Nuclear Projects 4 and 5. This case concerns the validity and enforceability under Washington law of the Participants' Agreement between the respondent "participants" and WPPSS; it does not concern the validity and enforceability of the $2.25 billion in revenue bonds issued by WPPSS pursuant to the Bond Resolution.

The seventeen respondents on whose behalf this Brief In Opposition is submitted are listed on the inside front cover. They are rural electric cooperatives located in Washington,

Oregon and Idaho and have no parent companies, subsidiaries or affiliates within the meaning of Rule 28.1 of this Court.

Petitioners failed to include in their list of respondents two groups of intervenors in the proceedings below. One group consisted of ratepayer associations and individual ratepayers of certain Washington public utility districts, and the other group consisted of ratepayers of the City of Ellensburg, Washington. In addition, a group of individual bondholders moved unsuccessfully to intervene in the proceedings before the Washington Supreme Court. They have filed in this Court a separate Petition for Certiorari (No. 84-1414) seeking review of the Washington Supreme Court's denial of their motion to intervene.

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STATEMENT OF THE CASE

Petitioners' statement of the case is almost wholly unsupported by the record and is filled with mischaracterizations and distortions of the facts. Petitioners' legal arguments are premised on these mischaracterizations. While these respondents' arguments necessarily address many of these misstatements and omissions, it is important to correct several of petitioners' factual distortions at the outset.

Mischaracterizing the genesis of the underlying agreements giving rise to this litigation, petitioners would have this Court believe that the respondents, almost all of which are small rural utilities with no expertise regarding nuclear power construction and little or no knowledge of the municipal bond market, somehow masterminded a grand scheme to separate sophisticated investors in tax-free bonds from their money. The fact of the matter, established by numerous uncontroverted affidavits, is that the Participants' Agreement for WPPSS Projects 4 and 5 was forced upon the participants by WPPSS and the Bonneville Power Administration (BPA), under threat of BPA's "notice of insufficiency," with most participants having no meaningful option but to sign.[1] Indeed, prior to the first appeal to the Washington Supreme Court, the trial court had ruled that one of the "genuine issues of material fact" remaining for trial was whether there was "procedural unconscionability" in the way the participants were induced to sign the Agreement.[2]

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[1]BPA is a federal agency which markets power from the federal hydroelectric system in the Pacific Northwest. Nearly all of the respondent utilities depend entirely on BPA for their power supply. BPA's extensive involvement in planning and promoting WPPSS Projects 4 and 5 and its strongarming the respondents by threatening them with regional power shortages if they did not sign the Participants' Agreement, is described in Falk, *"Prelude to the State WPPSS Cases: The BPA as Broker,"* 6 Municipal Finance Journal 41 (Winter 1985).

[2]First Supplemental Order On Motions For Summary Judgment, Jan. 26, 1983, ¶ 9. Petitioner Chemical Bank recently filed a brief in related litigation in the United States District Court for the Western District of Washington

Petitioners' statements that tiny municipalities like the City of Drain, Oregon or rural electric cooperatives like Lost River Electric Cooperative in Mackay, Idaho (a town of 500 people about 100 miles northwest of Idaho Falls) "directed" the issuance of $2.25 billion in municipal bonds and "supervised" the expenditure of such sums on the two nuclear projects (Pet. at 3) are untrue, unsupported by the record, and contrary to common sense. The financing and construction program for WPPSS Projects 4 and 5 was a massive undertaking, drawing on all the financial muscle and expertise that Wall Street and the nuclear industry could muster. Petitioners cannot pretend that this massive program was "directed" and "supervised" by small-town mayors and farmers in the Pacific Northwest.[3]

Petitioners' statements that the participants "expressly assured" prospective purchasers of the bonds issued by WPPSS that the bonds would be repaid and "repeatedly told prospective purchasers that they possessed authority to give such assurances" (Pet. at 3) are similarly untrue and unsupported by the record. In fact, the only such representations made to prospective bond purchasers were made by WPPSS itself and its own bond counsel, who testified in deposition that in reaching their opinion on the validity of the Participants' Agreement they made their own determination of the participants' authority and did not rely on the opinions of the participants' local counsel as to the participants' authority.

(*In re Washington Public Power Supply System Securities Litigation*, MDL No. 551) in which it stated, "BPA induced the 88 participants to sign their agreements by 'threat[ening] all utilities, particularly small utilities that were totally dependent on BPA for electricity, that they would be deprived of necessary power if they did not enter into the Participants' Agreements.'" The brief went on to state, "BPA also participated in the selection of the Supply System as the agency to plan, finance and construct the projects." Plaintiffs' Joint Memorandum In Opposition To Motion To Dismiss By The United States, Dec. 20, 1984, at 5-6.

[3]As one commentator has observed, "The participants in the WPPSS contracts, mostly small rural utilities, were necessarily passive partners in projects others assembled." Falk, *supra* n.1, at 51.

Petitioners mischaracterize the facts and try to mislead the Court by stating that the participants refused to "return" any portion of the bondholders' funds. (Pet. at 4, 8). Petitioners imply that the participants received the bondholders' money and refused to "return" it, when in fact the bondholders' money went not to the participants but to WPPSS (or, more accurately, to the underwriters who initially bought the bonds from WPPSS). The participants received nothing from the bondholders or from WPPSS and had nothing to "return." Similarly, petitioners misleadingly refer to WPPSS' expenditure of the bond sale proceeds as "their" (meaning the participants') expenditure of the funds. (Pet. at 11). The participants never received and never spent one dollar of bondholders' money; indeed, they never received anything of value from WPPSS' unsuccessful effort to build the uncompleted, now defunct nuclear plants.

Nowhere do the petitioners mention that the bonds in question are revenue bonds and not general obligation bonds. It is regrettable that WPPSS may lack sufficient revenues to meet its obligations to its bondholders, but the risk of such an occurrence was undertaken by the bondholders when they purchased revenue bonds issued by WPPSS rather than general obligation bonds (which WPPSS is prohibited by statute from issuing).

Petitioners tell this Court that the Washington Supreme Court "in a sudden, unjustified and unpredictable departure from all precedent, . . . retroactively manipulated state law so as to deny the bondholders any present remedy." (Pet. at 4). Nowhere do the petitioners favor the reader with the name of any Washington case or other precedent which was so startlingly departed from.[4] Nowhere do the petitioners mention the statutory framework and long history of Washington cases on municipal authority which the Washington Supreme Court carefully reviewed and relied on in reaching its two decisions.

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[4]In the entire petition only four prior Washington cases are cited. None represents precedent departed from.

Nowhere do the petitioners point out that what the Washington Supreme Court held invalid and unenforceable was the Participants' Agreement between the participants and WPPSS and not the bonds themselves or WPPSS' obligation to pay the bondholders principal and interest on the bonds as WPPSS—and not the participants—had promised to do.

Petitioners' statement of the case is so slanted, so filled with mischaracterizations and distortions of fact, and so wholly unsupported by the record, that it should be disregarded entirely. The salient facts are fairly set forth in the two decisions of the Washington Supreme Court reprinted as petitioners' Appendix A and Appendix B at A-5-10 and B-3-8.

REASONS FOR DENYING THE WRIT

No substantial federal question is presented by this case. Petitioners seek to persuade this Court to review two well reasoned decisions of the Washington Supreme Court interpreting Washington law governing the authority of Washington municipal corporations to enter into an agreement with another Washington municipal corporation. All aspects of the case are governed by state law. The invocation of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments amounts to nothing more than petitioners' reworked refrain that the state court decided an issue of state law wrongly.

There is no substantial Takings Clause question, because (1) the Takings Clause, like the Contract Clause, does not apply to judicial decisions, (2) the decision below was consistent with established law of the state, and (3) the respondents cannot be charged with inducing the bondholders to make investments which turned sour. There is no substantial Due Process Clause question, because (1) the court below decided questions of law, not of disputed facts, (2) petitioners were not deprived of an opportunity to be heard on any relevant issues, and (3) petitioners have not shown any reason to believe the court below was not impartial.

A. There Is No Substantial Takings Clause Question

Petitioners' principal argument is that there has been a violation of the Takings Clause of the Fifth Amendment (amend. V, cl. 4), as incorporated in the Due Process Clause of the Fourteenth Amendment (amend. XIV, § 1, cl. 3). As the petition demonstrates, this contention, as applied to the facts of this case, is not easily articulated. Petitioners have not made clear their view as to (1) who did the "taking" (the Washington Supreme Court? WPPSS? the municipal participants?), (2) what acts constituted the "taking" (the announcement of a judicial decision? WPPSS' failure to pay what it owed on the bonds? the municipal participants' failure to pay to WPPSS what they did not owe?), or (3) what was "taken" (the money the bondholders voluntarily paid to buy the bonds? the bondholders' intangible right to receive payment from WPPSS, which right remains undisturbed although WPPSS unfortunately may lack sufficient revenues to make the payments?).

Upon reflection, it becomes clear that petitioners' appeal to the Constitution is not, in fact, a Takings Clause claim at all. Instead, its essence is that there has been a judicial action that petitioners believe "would have violated the Contract Clause" (art. I, § 10, cl. 1) if "the same action had been taken by the Washington Legislature" (Pet. at 22). Putting aside the merits of that contention, the point relevant to certiorari is that the act complained of was not taken by the Washington Legislature. The act complained of was the adjudication of contractual rights by a state court based on its interpretation of state law. For well over a century, this Court has held that judicial interpretations of law do not give rise to federal claims under the Contract Clause. *See Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); *Ross v. Oregon*, 227 U.S. 150, 162 (1912); *New Orleans Waterworks v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30 (1887); *Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. (5. How.) 317, 341-42 (1847).[5]

[5] *Amicus* Public Securities Association argues that the Contract Clause is violated by a judicial interpretation of law that is "serving as a substitute for, or an extension of, state legislative action." Brief at 17. The "exception" suggested by this argument is of such obvious breadth as to swallow the rule recognized by this Court in *Tidal Oil* and other cases discussed above.

Recognizing the futility of claiming a violation of the Contract Clause, petitioners seek to recharacterize that claim in terms of the Takings Clause. The only advantage of this new clothing for the Contract Clause argument is its relative novelty. This Court never has held that the quintessential judicial act—the interpretation of law—can consitute a taking of private property for which compensation is required.[6] Nor does the issue appear to have been pressed before.

The reasons for the absence of similar claims are obvious. First, the Takings Clause is not a general limitation on governmental actions, but a guarantee that the eminent domain power will not be abused: governmental activity does not implicate the Takings Clause merely because it alters preexisting expectations or affects valuable rights. *See, e.g., Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). It is a truism that the line between legislative or administrative action that constitutes permissible governmental regulation, on the one hand, and action that so restrains the use of property as to constitute a taking, on the other, may sometimes be difficult to locate. But this Court's decisions do make clear that the degree to which preexisting expectations are frustrated is not itself determinative. Governmental action that admittedly alters clearly established, undisputed rights and thereby dramatically reduces the value of private property does not by that fact alone effect a taking of that property, as the unequivocal holdings of this Court plainly demonstrate. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

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[6]One Justice, in a concurring opinion, did suggest that a taking could occur by judicial interpretation of law, at least where the interpretation constituted a "startling" and "unpredictable" change, contrary to settled expectations. *Hughes v. Washington*, 389 U.S. 290, 294, 296-97 (1967) (Stewart, J., concurring). That opinion was not joined by any other Justice, nor has any subsequent opinion adopted that view. In any event, here the court below made no change adverse to petitioners of state law, much less a "startling" or "unpredictable" one.

While, in such circumstances, the decision whether a taking has occurred turns on a balancing of interests that resists ready articulation, the problem simply is not presented where, as in this case, judicial action is at issue. The reason for this distinction is simple: the essential premise for the taking inquiry is the abrogation of some established right of property ownership. *See Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The very issue in judicial interpretation of law, however, as exemplified by this case, is determination of such rights. The decision to abrogate rights that have previously been recognized by state law may or may not violate the Takings Clause; the determination what rights *do exist* under state law does not even implicate the Takings Clause. Judicial decisions, thus, lie wholly outside the ambit of this provision.

The second reason for the exemption of judicial acts from liability under the Takings Clause is the manifest undesirability of holding governments liable for judicial interpretation of law. This Court consistently has affirmed the existence of an unqualified immunity for judicial acts. *See Butz v. Economou*, 438 U.S. 478, 508-514 (1978); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). To make judicial decisions the basis for Takings Clause claims would contravene this established principle. Indeed, if judicial acts come within the Takings Clause, every judicial decision affecting the value of private interests could state a claim against the government.

Moreover, unless this Court sits to review state courts' construction of state laws,[7] the abrogation of immunity for judicial

[7]This Court often has declared that it does not sit as a court of appeals for resolution of state law claims; state courts will be the final arbiters of state law. *See, e.g., Hawks v. Hamill*, 288 U.S. 52 (1933); *Long Sault Development Co. v. Call*, 242 U.S. 272 (1916). That does not, of course, vouchsafe state court decisions against reversal: this Court has found state law irrelevant where superceded by federal law. *See, e.g., Hughes v. Washington*, 389 U.S. 290 (1967). But the appropriate question in this forum is whether state law is relevant and consistent with federal requisites, not whether the state courts properly have determined what is the state's law.

acts would make mistake of law by the complaining party a ground for compensation from the state. Thus, the finding that under state law no contractual right existed could not preclude the imposition of liability for the court's "taking" of those (nonexistent) rights, else judicial acts would never contravene the Takings Clause. If state courts' declaration of rights under state law can effect takings, there is no middle ground between two untoward results: either federal courts must usurp state courts' law declaring functions, or federal courts must require states to compensate persons who have, to their detriment, acted on misconceptions as to the law. The startling fact is not that this absurd construction of the Constitution has not previously been urged but, rather, that any petitioners could seriously propose to bring judicial interpretations of law within the Takings Clause ambit.

Although petitioners clearly interpret the Takings Clause in this fashion, they do not list as a "question presented" whether judicial acts can violate the clause. Instead, petitioners would have the Court break new ground without confronting the central issue head-on. They advance four subsidiary arguments to circumvent the obvious problem of making judicial acts the basis for Takings Clause liability: first, petitioners invoke a recent case as authority for reaching the judicial act here; second, petitioners claim that the Washington Supreme Court changed the law of that state; third, petitioners allege that their purchase of WPPSS bonds was induced by respondents; and, finally, petitioners conflate the Takings Clause, the Contract Clause, and the Due Process Clause, hoping that out of the resulting conceptual confusion will emerge a catchall constitutional remedy for the perceived wrong. These claims do not enhance the substantiality of the federal issue presented. Each claim, insofar as it is relevant to the federal issue, either seriously misconstrues legal precedent or fundamentally mischaracterizes the facts of this case. We address these additional claims, *seriatim*, below.

1. *Webb's* does not modify the judicial act rule.

Petitioners assert that this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), sup-

ports their argument that a taking can occur by judicial act. The assertion is unfounded. *Webb's* held that a taking occurred when a court clerk, pursuant to state law, appropriated for public use the interest on interpleader funds deposited with the court. The propriety of the judicial order for deposit of funds was not at issue. Nor was the (perhaps doubtful) state court construction of the state statute. This Court accepted the Florida court's conclusion as to Florida law, holding that what the statute authorized, and the clerk effected, was a taking. *Id.* at 163. This Court did not hold that the state court's interpretation of state law—or its order requiring the deposit of funds with the court, less clearly a judicial act excluded from the Takings Clause's ambit—constituted a taking of private property.

Webb's might be apposite here if petitioners challenged the Washington *statutes* interpreted below. They do not. Indeed, it would be absurd to claim that the state law authorizing subordinate public bodies to acquire power-generating facilities and to purchase power only under limited conditions effected an unconstitutional taking of petitioners' property. The state law did not compel petitioners to surrender any property. Petitioners invested in revenue bonds in the mistaken belief that Washington law authorized the participants to enter "take or pay" agreements that allegedly required payment even if the venture did not produce a single kilowatt of power. The failure of the venture combined with the petitioners' mistake of law made their investment a bad one. That hardly establishes the unconstitutional exercise of eminent domain power by the state. *Webb's* adds nothing to this contention.

2. The Washington Supreme Court's opinions effected no change in state law.

Petitioners rest their taking claim on the allegation that the decision in *Chemical Bank v. Washington Public Power Supply System*, 99 Wash.2d 772, 666 P.2d 329 (1983) *(Chemical Bank I)* constituted a "surprising" and "unprecedented" change in state law, a "sudden, unjustified and unpredictable departure from all precedent" (Pet. at 4). Even if such a judicial decision could constitute a taking, there has been no change of

law as alleged in the instant case. In fact no prior decision in Washington had addressed whether a Washington municipality was authorized to obligate itself to pay for electricity that it might not receive; but the reasoning that supports the court's holdings on the invalidity of such obligations and on the consequences of their invalidity is fully consistent with precedent under Washington law.[8]

For example, petitioners express surprise at the court's narrow standard for construing implied municipal authority. The court's decision on that issue followed longstanding precedent, cited by the court, that narrowly construed municipal power and that resolved doubtful claims of authority against the municipality. 99 Wash.2d at 792, 666 P.2d at 339-340, Pet. App. B-19.[9] Under Washington law, narrow construction is particularly appropriate where a municipality seeks to incur indebtedness based on general grants of authority to provide services. *See Edwards v. Renton*, 67 Wash.2d 598, 409 P.2d 153 (1965).[10] Even if there were consensus that the rule of narrow

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[8]Indeed, petitioners do not explain in what respect, from the standpoint of Washington precedent, the decision below was surprising. See n.4, *supra*.

[9]*See, e.g., Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 650 P.2d 193 (1982); *Port of Seattle v. State Utilities & Trans. Comm'n*, 92 Wash.2d 789, 597 P.2d 383 (1979); *In re Seattle*, 96 Wash.2d 616, 638 P.2d 549 (1981); *Pacific First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wash.2d 347, 178 P.2d 351 (1947); *Griggs v. Port of Tacoma*, 150 Wash. 402, 273 P. 521 (1928); *State ex rel. Hill v. Port of Seattle*, 104 Wash. 634, 177 P. 671, 180 P. 137 (1919); *State ex rel. Hill v. Bridges*, 87 Wash. 260, 151 P. 490 (1915).

[10]Washington law contains various other provisions that constrain the powers of local governments. Washington Constitution, art. VIII, § 6 limits the amount of debt that a municipality may incur without a vote of the electorate. These respondents urged in *Chemical Bank I* that the municipal participants' obligations under the Agreement as interpreted by petitioners constituted "debt" within the meaning of that provision and thus violated the debt limit. In contrast to their suggestion to this Court that the participants "borrowed" the bondholders' funds, petitioners argued in the state court that WPPSS, not the participants, had borrowed money from the bondholders: "Under the Participants' Agreement, no Participant has issued its own bonds, nor has any Participant borrowed money; thus no 'debt' has been created. . . ." Memorandum of WPPSS In Support Of Plaintiff Chemical Bank's Motion For Summary Judgment, Oct. 6, 1982, at VI-5-6. It was in

construction is undesirable, that state law issue does not raise any question of federal constitutional law. In addition, the court noted that broader home rule powers were unavailable to the participants since, under longstanding state law (*see* Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 771-72 (1963)), those powers could be exercised only with respect to purely local affairs. The court held simply that power projects intended to generate electricity for use throughout the Pacific Northwest could not be considered to fall within the category defined by Washington law as "local affairs."

Petitioners allege "surprise" at the narrow construction of municipal authority in this case and the consequent conclusion that the Participants' Agreement was invalid, insisting that no one could have foreseen this possibility. Yet parties that have financed public power projects with similar "take or pay" arrangements in other jurisdictions have foreseen exactly the same possibility under the law of other states. In virtually every other jurisdiction employing this controversial financing device, the obligation has been considered such a radical departure from traditional financing arrangements, and one for which municipal authority was so highly suspect, that its use has been preceded by a test case to determine its validity, by the passage of express authorizing legislation, or by both.[11] In

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response to this contention that these respondents argued (*see* Pet. at 20 n.12) that for purposes of applying the Washington Constitution's municipal debt limitation WPPSS should be deemed a financing conduit insofar as petitioners were seeking to saddle the participants with debt service obligations on bonds issued by WPPSS. The Washington Supreme Court found it unnecessary to reach that issue since it decided that the Participants' Agreement was void under the *ultra vires* doctrine.

[11]*See, e.g.*, S.C. Code Ann. § 6-23-110 (Law Co-op. Supp. 1982); Mass. Ann. Laws,ch. 164A, § 3(b) (Law Co-op. 1979); Me. Rev. Stat. Ann. Tit. 35, § 4103(1)(B) (Supp. 1982); N.C. Gen. Stat. § 159B-12 (1982); Va. Code § 15.1-1611 (1981); Vt. Stat. Ann., tit. 30 § 604 (Supp. 1982); *Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Frank v. City of Cody*, 572 P.2d 1106 (Wyo. 1977); *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. 1977).

this case, there was the same reason for question; petitioners, however, took no measure to ensure the validity of the arrangements prior to the sale of the bonds.

While the rule construing municipal authority narrowly was not changed, there was one arguable change in Washington law made by the Washington Supreme Court. That change, however, plainly benefitted petitioners. In prior decisions involving the right of municipalities to incur the risks associated with power generation facilities, the Washington Supreme Court consistently had required that municipalities retain the rights of ownership and retain legal control over the risk of project failure and, thus, had prevented municipalities from delegating authority except for purely ministerial functions. *See* 99 Wash.2d at 785-791, 666 P.2d at 336-339, Pet. App. B-12-18; *PUD 1 v. Taxpayers of Snohomish County*, 78 Wash.2d 724, 479 P.2d 61 (1971); *Roehl v. PUD 1*, 43 Wash.2d 214, 261 P.2d 92 (1953). As the court noted, its prior decisions had involved cases in which there was legal control over project risks because the municipalities had an actual ownership interest in the projects. Any change in this case took the form of a relaxed test that permitted municipalities to take the "dry hole" risk even if they could not demonstrate ownership of the projects, but only legal control equivalent to ownership.[12] Despite this relaxation of its previous requirement, the court ruled that the Participants' Agreement could not, as a matter of law, satisfy the test.

Finally, there is no merit to petitioners' claim that Washington law prior to *Chemical Bank v. Washington Public Power Supply System*, 102 Wash.2d 874, 691 P.2d 524 (1984) *(Chemical Bank II)* mandates restitution notwithstanding the invalidity of the underlying contract. The general rule, followed in Washington, is that restitution is available only where minor, technical defects impair the bonds' validity. *See, e.g.*,

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[12]The concurring opinion urged that the traditional strict "ownership" requirement be retained. 99 Wash.2d at 799-800, 666 P.2d at 343-344, Pet. App. B-26-27.

D'Esterre v. New York, 104 Fed. 605 (2d Cir. 1900); *Cuddy v. Sturtevant*, 111 Wash. 304, 190 P. 909 (1920); Uniform Commercial Code § 8-202, Official Comment 6. The rule, however, denies restitution altogether where bonds have been issued without legislative authorization. *See, e.g., Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877). The decision in *Chemical Bank II* simply recognizes this limitation on estoppel and restitution rights, currently codified in the Washington Uniform Commercial Code as RCW 62A.8-202. What was at issue in *Chemical Bank II*, however, was not the validity of the bonds sold by WPPSS but the validity of the Agreement between the participants and WPPSS. Because the court held the Agreement did not constitute a "security" within the definition of RCW 62A.8-102(1)(a), there was nothing to trigger § 8-202 rights. 102 Wash.2d at 908-909, 691 P.2d at 543-544, Pet. App. A-35-36. As this holding was one of first impression, it is difficult to understand how it could form the basis for any constitutional claim predicated on change of law.

Petitioners' citation to *Noel v. Cole*, 98 Wash.2d 375, 655 P.2d 245 (1982), as conflicting prior state law is inappropriate. The statement which petitioners cite for the proposition that restitution is available here is a footnote to the following discussion by the court: "Under certain conditions, a private party acting in good faith [with a governmental agency that acted *ultra vires*] is entitled to some recovery. First, the agency must have had the power it sought to exercise but merely have exercised it in an irregular manner or by an unauthorized procedural means." 98 Wash.2d at 381, 655 P.2d at 249-50 (bracketed matter added). Here, the court expressly acknowledged the applicability of the *Noel v. Cole* test and then explicitly held that the contract involved in this case *was* outside the power sought to be exercised rather than simply the exercise of an authorized power in an irregular manner. 102 Wash.2d at 911, 691 P.2d at 545, Pet. App. A-37-38. Petitioners' claim cannot be that the Washington Supreme Court changed state law: instead, they ask this Court to substitute its judgment for the

state court's and declare state law on what constitutes a substantive, rather than procedural, *ultra vires* act.

In summary, petitioners fail to cite a single case in which the Washington courts had articulated a rule of law contrary to the decisions below. Petitioners' bald assertions of "sudden changes in state law" (Pet. at 17) and "retroactive manipulations of state law" (Pet. at 18) are nothing more than empty rhetoric.

This case, thus, bears no resemblance to any case where this Court has found it necessary to protect bondholders against state governmental actions. All such cases involved the express repudiation or devaluation of obligations notwithstanding legislative recognition that those obligations had been incurred validly under state law.[13] *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Port of Mobile v. United States ex rel. Watson*, 116 U.S. 289 (1886); *Von Hoffman v. Quincy*, 71 U.S. 535 (1867). Here, in contrast, this Court is not dealing with a situation in which an admittedly valid obligation has been deemed no longer to exist by legislative fiat. Rather, the Washington Supreme Court interpreted the "dry hole" obligation to be invalid at the first opportunity.

Moreover, the decision of the Washington Supreme Court not to grant restitution is entirely consistent with the holdings of this Court. Notwithstanding the misleading assertions by petitioners and *amici* that participants have refused "even to return the principal amount of the bonds" (Underwriter Brief at 5; *see* Public Securities Association Brief at 13), the simple truth remains that all bond proceeds were delivered to WPPSS. No proceeds were obtained by participants. Thus, the

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[13] *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1864), cited by petitioners unsuccessfully in the Washington Supreme Court, follows this pattern. That case involved an express reversal of state law after a bondholder relied explicitly on the initial state decision. This Court's decision on the point, which was not decided on constitutional grounds, see *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 454 (1924), does not survive this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Washington Supreme Court found that participants did not benefit from the bonds in a manner that would trigger any restitutionary right. 102 Wash.2d at 911, 691 P.2d at 545, Pet. App. A-38. Even during the period in the nineteenth century when this Court used restitutionary theories to prevent municipalities from being unjustly enriched by the issuance of void bonds, this Court consistently held that where "(t)he money received by the city . . . has long passed out of its possession, (bondholder funds) cannot be restored . . . ." *Litchfield v. Ballou*, 114 U.S. 190, 193 (1884). *A fortiori*, no recovery in restitution is available where the city never received any bond proceeds in the first instance. *See Parkersburg v. Brown*, 106 U.S. 487 (1881) (relief against city permitted only to extent bondholders could trace their funds into property purchased with bond proceeds and held by city).

3. There was no inducement by participants that could constitute a taking.

Petitioners next claim that the action of participants, conjoined with the opinion of the Washington Supreme Court holding the Participants' Agreement *ultra vires*, constituted a violation of the Takings Clause by defeating bondholders' investment-backed expectations. According to petitioners, bondholders' investment decision was made solely in reliance on representations by and conduct of participants. Perhaps the best response to this allegation is to note that it raises factual issues not properly before this Court. Petitioners submitted no affidavits to support this claim, and there was no finding in the state courts on the claim. Petitioners, therefore, have asked this Court to make a factual determination on a matter wholly outside the record of this case.

The bondholders cannot establish that the participants induced investment-backed expectations that the validity of the Agreement was beyond doubt. The mechanics of municipal bond issuance make plain that bondholders looked to parties other than the participants to ensure the validity of the underlying Agreement that presumably secured the bondholders'

investment. In this case, two bond counsel firms were asked to investigate and opine on the authority of participants to enter into the Agreement. Indeed, the opinion of expert bond counsel on the validity of the transaction is well recognized as the *sine qua non* of municipal bond issuance. *See* R. Lamb & S. Rappaport, Municipal Bonds at 289 (1980); *Amici* Underwriters' Brief at 4. WPPSS bond counsel's opinion, and no one else's, was printed in the Official Statement (the municipal bond equivalent of a corporate prospectus) for each issuance of bonds and on each of the WPPSS bonds. That opinion stated that bond counsel had "examined into the validity of" 72 of the 88 Agreements and had concluded that each such Agreement "has been duly authorized, executed and delivered by each of the parties thereto and constitutes a valid and binding agreement enforceable in accordance with its terms." There was no indication that bond counsel had relied on opinions of participants' own local counsel on the issue of authority or that investors knew of the latter opinions. As in all municipal bond transactions, bondholders were basing their investment decisions, and hence their investment-backed expectations, on bond counsel who were experts in public power financing through municipal bonds.

Petitioners also mischaracterize the appropriate scope of bondholders' "investment-backed expectations." Petitioners would have this Court believe that these investments were risk-free for bondholders, that the "business risk" was always intended to lie with the participants. (Pet. at 4). The facts speak differently. These bonds were not general obligation bonds, as to which the issuer pledged all its revenue producing power to ensure payment of debt service. *Cf. Flushing National Bank v. Municipal Assistance Corporation*, 40 N.Y.2d 731, 358 N.E.2d 848, 390 N.Y.S.2d 22 (1976). Rather, bondholders were informed that these were revenue bonds, payable only from revenues received by WPPSS through its ownership and operation of the projects at issue. The key distinction between general obligation bonds and revenue bonds, of course, is that on the former the issuer bears the risk of a

project's failure while on the latter the bondholders bear the risk of a project's failure.[14] For this reason, revenue bonds pay a higher rate of interest than general obligation bonds.

Even if individual bondholders were unaware of the risks inherent in these projects, the technical distinctions among bonds, and the legal constraints on municipal authority, their representatives—sophisticated underwriters, trustee and bond counsel—cannot claim such ignorance.[15] Nevertheless, in the face of a repayment provision which was novel in the jurisdiction involved, a multi-billion dollar cash outlay, and a venture involving localities from various states, neither underwriters, nor trustee, nor bond counsel took any action to ensure the validity of the Participants' Agreement prior to issuance of the bonds.

Petitioners and *amici* now claim that there was nothing they could do, that a declaratory judgment action was unavailable. As petitioners and *amici*, experts in the workings of the municipal bond market, are well aware, that statement is simply disingenuous. It is standard practice in the municipal bond

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[14]*See Chemical Bank I* concurring opinion, 99 Wash.2d at 804-805, 666 P.2d at 346, Pet. App. B-31-32.

[15]Petitioners argued below that one cannot justifiably rely on another's opinion as to municipal authority and therefore cannot claim to have been "induced" to act by such an opinion. Certain participants, including these respondents, had argued that in 1976, when WPPSS and BPA were urging the participants to sign up, WPPSS had failed to disclose to them the fact that its expert bond counsel had doubts about the legal authority of 16 of the 88 participants to enter into the Agreement. In response, counsel for Chemical Bank argued as follows in the state trial court: "Finally, the rule of law really is that if there had been a representation that the 16 had authority, and they didn't have authority, and that representation was made by the Supply System, it would not be a representation that would be material nor one upon which the participants could rely to later disavow their solemn promise, because the representation of what the law allows one to do is not a representation to be relied upon at the risk of the person relying. In other words, if somebody says somebody has legal authority to do something, you better check it out yourself, you don't have any right to rely on that kind of a representation." (Transcript, Oct. 12, 1982, at 382).

field to obtain pre-issuance validation by bringing a declaratory action or an action seeking special relief such as mandamus against an official or agency whose action is necessary to bond issuance. In form, such mandamus actions pray for an order requiring the official or agency to take, or enjoining it from taking, the action prerequisite to marketing of the bonds. *See, e.g., Johnson v. Piedmont Municipal Power Agency*, 287 S.E.2d 476 (S.C. 1982); *Massachusetts Home Mortgage Finance Agency v. New England Merchants National Bank*, 376 Mass. 669, 382 N.E.2d 1084 (1978); *Board of Supervisors v. Massey*, 210 Va. 253, 169 S.E.2d 556 (1969). Indeed, this is an accepted and time-honored mechanism for determining, prior to issue, the validity of bonds or other debts in the state of Washington.[16]

Furthermore, petitioners are wrong about the unavailability of ordinary declaratory relief. The Washington courts have construed the Washington declaratory judgment statute liberally and, in cases involving issues of major public importance, have dispensed with the usual requirement of an "actual case or controversy." *See, e.g., Seattle School District No. 1 v. State*, 90 Wash.2d 476, 489-490, 585 P.2d 71, 80 (1978); *Clallam County v. Board of Clallam County Commissioners*, 92 Wash.2d 844, 848-849, 601 P.2d 943, 945 (1979); *State ex rel. Distilled Spirits Institute, Inc. v. Kinnear*, 80 Wash.2d 175, 178, 492 P.2d 1012, 1014 (1972).

Thus, petitioners and *amici* could have avoided this entire litigation by a device of which they simply cannot claim they were ignorant. They chose not to take any such action. Nor did they seek to procure express legislative approval, as deemed necessary and obtained in so many other jurisdictions. Instead, they ignored every opportunity to ensure the validity of

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[16]*See, e.g., State ex rel. Washington Toll Bridge Authority v. Yelle*, 56 Wash.2d 86, 351 P.2d 493 (1960); *State ex rel. Washington State Building Financing Authority v. Yelle*, 47 Wash.2d 705, 289 P.2d 355 (1955); *Henderson v. Town of Tumwater*, 46 Wash.2d 758, 285 P.2d 119 (1955); *State ex rel. Troy v. Yelle*, 36 Wash.2d 192, 217 P.2d 337 (1950).

the Participants' Agreement under state law and thus took the very risk of invalidity that has materialized, the very risk that bond counsel are hired to prevent.[17] Petitioners and *amici* cannot now bootstrap their discontent into a constitutional issue and impose this risk on respondents, as if unquestioned validity were their justifiable expectation induced by participants.

4. Amalgamating the Takings, Contract and Due Process Clauses does not provide a catchall constitutional remedy for every perceived wrong.

In addition to the Takings Clause, petitioners list the Contract Clause and the Due Process Clause of the Fourteenth Amendment as constitutional provisions relied on to establish the substantiality of their supposed federal question. They do not spell out their analysis of these other clauses. Instead, the petitioners rely on them obliquely, using the language of "impairment," freely mixing together citations to decisions under the three clauses, and, at the close of their taking argument, invoking the common spirit of the three clauses (Pet. at 22). The essence of their argument is that because bondholders have risked and lost a large sum of money, there must be something in the United States Constitution that will get that money back.

Petitioners' use of the three clauses is understandable. Separate analysis of each reveals no colorable federal question. The Contract Clause argument fails because petitioners are challenging a judicial act. The Takings Clause argument fails for

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[17] *Amicus* Public Securities Association asserts that it would be "impossible to maintain the efficiency of the current municipal bond market if prior judicial determination was necessary in all, or even most, instances." Brief at 4. This statement is simply irrelevant. The overwhelming majority of bond issues present no novel question of municipal law and thus require no prior judicial approval. Only in the rare case when a novel financing technique is being utilized, as here, or when bond proceeds will be dedicated to an enterprise of questionable public purposes, is prior approval necessary. In such cases, current practice is for the issuer, underwriter, or bond counsel to seek judicial or legislative approval. None was obtained here.

the same reason. As discussed above, the "change of law" and "inducement" arguments, even were they legally colorable, present hypothetical issues not raised by the facts of this case. And the substantive due process claim borders on the frivolous, given the disfavor into which precedents such as *Lochner v. New York*, 198 U.S. 45 (1905), have fallen. Petitioners need look no further than the case immediately following *Webb's* in the U.S. Reports for evidence of the burden that must be overcome to invalidate economic and social regulation on substantive due process grounds. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (sustaining, against a Fifth Amendment due process challenge, congressional legislation reducing retirement benefits for railroad employees who had worked up to 25 years for railroads in expectation of receiving certain benefits).

Given that the clauses taken individually do not reveal a substantial federal issue, petitioners' attempt to combine all three is unavailing. Although the clauses are not concerned with wholly unrelated issues, petitioners' attempt to fashion from the three separate clauses a general prohibition on any governmental action that adversely affects property interests (real or supposed) suggests a dramatic change in the Constitution. As with the several provisions protecting particular individual interests in liberty, the specific constitutional protection of property interests has been spelled out in three separate clauses, each shaped according to its particular purpose, context and history.[18] Melding the three into a general protection against governmental actions that affect property interests creates a broad, dangerous and unintended revisory power.

Petitioners suggest that this broad revisory power—even if not generally recognized—is appropriately exercised where state governmental actions disadvantage persons who are po-

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[18]The fact that they were adopted not as part of a single lawmaking effort but at three separate times spanning 80 years is but the most visible evidence of the difficulty of reading the clauses as a unitary constraint on governmental action.

litically powerless. Petitioners and *amici* at various points throughout their briefs argue that this is such a case.[19] *Amici* argue explicitly that the decisions of the Washington Supreme Court were "home town" decisions (City of Seattle Brief at 7) motivated solely by "protectionist" tendencies (Public Securities Association Brief at 6). Wholly apart from the consequences for federalism that would follow from this Court's impugning the motives of a state's highest court, there is simply no evidence that self-interest motivated the Washington decisions.

This Court, indeed, has on several occasions indicated its special concern for the powerless: the poor, the disenfranchised, and out-of-state competitors of entrenched in-state business. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951). That concern, however, is utterly irrelevant here. First, purchasers of tax-exempt bonds are not those in low-income brackets, and merely listing the petitioners and some of their supporting *amici* reveals an impressive array, not of the impoverished, but of financial giants.

Second, these entities and the individuals they represent have considerable power to protect themselves. Certainly, underwriters, bond purchasers, and the brokers and bond counsel who advise them, are able to assess the risk of bond investments. They may guess wrong, but they have ample opportunity to evaluate the risk and choose to invest or not: no state official forces anyone to buy bonds. Moreover, underwriters, such as *amici*, exercise substantial control of the debt markets to which municipalities and states must have access to finance necessary capital projects. Their participation and co-

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[19]The statement at Pet. 8-9 concerning the holders of the bonds is unsupported in the record. Further, contrary to the implication there, the vast majority of the bonds, in terms of dollars purchased, are held by institutional investors. (Note petitioners' odd arithmetic, in which the supposed "average" holding of $15,000 times the supposed 45,000 total of all bondholders equals less than half the supposed holdings by individuals and less than one third of the $2.25 billion total face value).

operation is necessary if the State of Washington and its political subdivisions are to enjoy ready availability of credit at favorable interest rates. Thus, participants and state officials have substantial incentives to act in a manner consistent with underwriter and bondholder interests.

Third, largely as a result of the above, it is by no means clear that the interest of the residents of Washington is entirely in line with the decision of the Washington Supreme Court in this case. It was well understood in the State of Washington prior to *Chemical Bank I* that a decision against the underwriters would have an adverse impact on the financing capacity of the state and its municipalities. Indeed, the first claim of underwriters after the *Chemical Bank I* decision was that a default by WPPSS would lead them to charge higher interest rates for financings in the Pacific Northwest. *See, e.g., N.Y. Times*, June 16, 1983 at D9 (statement by underwriter that investors will "shun bonds" of the region after the decision).

No better evidence of bondholder influence could exist than the City of Seattle's *amicus* brief. Seattle argues that it and all Northwest non-participants in Projects 4 & 5 suffer a "lowered bond rating and 'WPPSS penalty' applied by the financial community" as a result of the Washington Supreme Court's decisions. City of Seattle Brief at 3. In short, Seattle implies that the Washington Supreme Court could have imposed the cost of the failure of the two nuclear projects either on the Washington municipalities that were participants, or on all Washington municipalities in the form of subsequent higher interest rates. It simply cannot be said that the latter choice, which may have affected adversely a greater number of the state's citizens, was a self-interested, protectionist act.

The laws of Washington, as interpreted by its highest court, strike a reasonable balance between delegation of power to local officials and restriction on those officials' authority. This balance may or may not advantage Washington residents generally, since the alternative to liability for "dry hole" risks may be higher financing costs for all capital projects. But the state

court's interpretation of state law, which follows from established state precedents, cannot plausibly be thought the basis for a claim of constitutional violation.

B. There Is No Substantial Due Process Question

Petitioners also claim that the Washington Supreme Court violated the Due Process Clause of the Fourteenth Amendment by denying them a hearing on two purported issues of disputed fact, by referring to a supposedly unavailable remedy, and by hearing the case with two justices who presumably used electricity in their homes. (Pet. at 23-27). We address each claim in turn.

1. The "control" issue.

Petitioners first claim that they should have been granted a hearing to determine whether the Participants' Agreement gave respondents "sufficient control" over the WPPSS projects to contract for "dry hole" risks. Petitioners assert the Washington Supreme Court intended this "factual" issue to be critical to their determination of municipal authority (Pet. at 23, 24). Petitioners admit, however, that the Washington Supreme Court rejected this interpretation of its *Chemical Bank I* decision, clearly holding that the issue of control was to be determined from the relevant documents as "a question of law" rather than a factual inquiry dependent on evidence of the contract's implementation. *Chemical Bank II*, 102 Wash.2d at 894, 691 P.2d at 536, Pet. App. A-20.

Petitioners' contention that the Washington Supreme Court initially declared the control issue to be one of fact is a plain misreading of the court's opinion. In both its *Chemical Bank I* and *Chemical Bank II* decisions, the Washington Supreme Court determined, as a matter of state law, that the Agreement by its terms did not confer sufficient control on participants to constitute the legal equivalent of ownership, where participants could only act through a part-time committee that was required expressly to disapprove on short notice proposed WPPSS actions on major matters. Moreover, under the Agree-

ment any such disapproval would not block the WPPSS proposal; it would merely cause the dispute to be referred to an outside consultant who might or might not decide the WPPSS proposal should become ineffective on the ground it was contrary to "prudent utility practice" (the only basis for disapproving a WPPSS proposal). Perhaps the clearest demonstration of the participants' lack of control is that under the Agreement the participants could not prevent WPPSS from terminating the projects if WPPSS determined *unilaterally* that it was unable "to construct, operate or proceed as owner . . . due to financing, licensing, construction or operating conditions or other causes which are beyond its control." Agreement, §§ 15 & 13(a)(1)(A).[20] Given the clear meaning of these clauses, the manner of their implementation was not relevant to the court's holding. Thus, no evidentiary hearing on implementation was necessary or appropriate.[21]

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[20]It is ironic that petitioner WPPSS argues to this Court that the Washington Supreme Court violated the federal constitution in concluding that the participants lacked control equivalent to ownership. In other litigation, concerning whether the Participants' Committee was subject to the state Open Public Meeting Act, WPPSS counsel told the state trial court: "The participants are purchasers of the power. They are not builders of the nuclear plants. . . . [The Participants' Committee] does not control the corporation. . . . [The Committee has] no authority and control over the board of directors, . . . The board of directors of the Supply System continues to have authority over the construction of the projects, . . . You couldn't have a more arm's length lack of control relationship . . . , and if the board of directors wants to terminate the projects, it can do so without the approval of the Participants' Committee, . . ." *Kahn v. WPPSS*, King Co., Wash. Sup. Ct. No. 81-2-10044-9, Transcript, July 8, 1981, at 15, 29-30.

[21]The court's determination of the control issue as a matter of law, moreover, is both appropriate and desirable to ensure predictability about municipal authority to engage in commercial transactions. Municipalities and those who deal with them must be able to determine the enforceability of a transaction at the time they enter into the contract. The consequence of allowing subsequent events to color the initial validity or invalidity of the underlying document is made clear by imagining a situation contrary to what arose in the instant case. Assume that the documents made clear that the participants had the right to exercise sufficient control over the projects to validate their taking the "dry hole" risk under state law, and that bonds were issued on that

2. The "equitable estoppel" issue.

Petitioners also complain that they were denied a hearing where they could establish facts to support their claim that participants should be equitably estopped from denying liability under the Agreement. However, no factual issue relevant to the court's holding was in dispute. The Washington Supreme Court decided that even if petitioners could prove reliance on statements by the participants, they would not prevail on their estoppel claim because the statements allegedly relied on were statements of law and, as a matter of Washington state law, such statements are not a basis for estoppel. 102 Wash.2d at 905, 691 P.2d at 542, Pet. App. A-32. Thus, no hearing right for the development of a factual record was triggered.[22]

Even if the representations allegedly relied upon by petitioners were representations of fact, this still would not give rise to a substantial federal question worthy of review. Contrary to petitioners' assertions, they had ample opportunity to establish a factual basis for their claim of equitable estoppel. Petitioners neglected to take that opportunity when they failed to file responsive affidavits to participants' summary judgment motions following *Chemical Bank I*. No evidentiary issue is raised when a party fails to respond and refute allegations. Thus, in such an instance, there is no denial of due process when a tribunal does not conduct an evidentiary hearing. *Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470 (9th Cir. 1984);

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understanding. If it subsequently developed that participants abdicated their contractual right to control so that WPPSS was making all decisions unilaterally, we doubt the bondholders would accept the argument that subsequent events altered the previous legal status of their bonds. Similarly, bondholders may not now claim a right to demonstrate that subsequent events transformed transactions that were initially invalid for lack of control into ones that became valid.

[22]Petitioners apparently agree, as their counsel argued below: "In other words, if somebody says somebody has legal authority to do something, you better check it out yourself, you don't have any right to rely on that kind of a representation." See n.15, *supra*.

see also, Environmental Defense Fund v. Alexander, 614 F.2d 474 (5th Cir. 1980) (no denial of due process where both parties presented the issue of laches to the court in their briefs). Here, petitioners had the opportunity that they claim they were denied. There was no denial of due process.

3. The alleged unavailability of prior declaratory relief.

Petitioners claim the Due Process Clause was violated because the Washington court mentioned the possibility of obtaining prior declaratory relief as to the validity of the Agreement, which petitioners now say was unavailable to them. Petitioners' argument fails for two reasons. First, the mention of the possibility of such relief was not important to the court's decision and did not alter the result. Second, petitioners are simply wrong. Such prior determination of the validity or invalidity of the underlying agreements could have been obtained through declaratory judgment or mandamus proceedings or, if the legislature could have been persuaded to enlarge municipal authority in Washington, through legislation.

4. The alleged partiality of the tribunal.

Petitioners' final contention is that the decision of the Washington Supreme Court violated the Due Process Clause because that tribunal was not impartial. The entire explicit basis for this claim is contained in a footnote to the petition observing that two of the nine justices of the *Chemical Bank I* court lived in communities served by participant utilities. (Pet. at 27 n.22). Petitioners do not identify any case in which a remote, unspecified and in all likelihood *de minimis* interest has been held to mandate recusal as a matter of constitutional law. The cases to the contrary are conclusive. *See, e.g., Friedman v. Rogers*, 440 U.S. 1 (1979); *see also, In Re Virginia Electric & Power Co.*, 539 F.2d 357 (4th Cir. 1976) (district court judge's remote and speculative interest in refund that might be ordered for electric utility customers was not sufficient ownership of a legal or equitable interest as to constitute a disqualifying financial interest in the litigation).

Petitioners' frequent reference to their nonresidence in Washington may be meant to suggest a second implicit ground for disqualifying the justices of the Washington Supreme Court: bias against bondholders who seek to extract a large sum of money from Washington residents. Were petitioners to advance this claim seriously, they would have to explain why, if the six justices forming the *Chemical Bank II* majority were biased, the three dissenters and the state trial judge were not, or why the Oregon Supreme Court (much cited by petitioners) was not similarly biased where claims against its residents were in issue. No serious question of partiality under the Due Process Clause exists.

CONCLUSION

Petitioners seek to elevate these state court rulings, on issues of state law, into a federal case by means of a conceptually muddled constitutional theory based on nonexistent facts. The underlying thesis of the petition seems to be that it is unthinkable and therefore "surprising" for a state supreme court to apply state law in a fashion that ultimately results in a $2.25 billion bond default. In short, it is only the amount of money involved in this case that transforms it from the garden variety case in which a state court holds that a contract is unenforceable under state law. Unwilling to admit this, petitioners urge legal theories that would create a federal question of constitutional dimension any time a state court holds a contract unenforceable under state law.

Two years after the decision in *Chemical Bank I*, the municipal bond market remains a vibrant part of our economy, with issues according to *amicus* Public Securities Association of $100 billion in 1984 alone. (Brief at 1). Petitioners' attempt to demonstrate a "destabilized" municipal bond market as a result of the decisions below is as unavailing as their attempt to discover a substantial federal question arising out of this litigation.

The petition for a writ of certiorari should be denied.

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No. 84-1258

IN THE

Supreme Court of The United States

OCTOBER TERM 1984

CHEMICAL BANK AND
WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
Petitioners,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF BENTON
COUNTY, WASHINGTON, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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1. *Respondents' State Law Justification Defense Fails to Meet the Important Takings Question Presented by This Case.*

It is the principal burden of respondents' argument that the appropriation of a $2.25 billion loan for public use is rendered immune from Federal constitutional scrutiny because it was

sheltered by a state law "substantive ultra vires" doctrine.[1] Respondents stress that that doctrine was designed to protect their constituents from the costs of public projects respondents undertook on their behalf. According to respondents, invocation of that state law purpose is sufficient, without more, to justify total forfeiture of the bondholders' funds.

The decision below achieved precisely the purpose respondents describe: the total protection of local majorities from the costs of public projects. It does not follow, however, that this case involves matters exclusively of state concern—or that granting certiorari here would transform all state court decisions declaring contracts invalid into cases of constitutional dimension. The Takings Clause was adopted to ensure that majorities acting through government would not avoid the costs of public projects by imposing those costs on private parties lacking power to protect themselves. Whether and under what circumstances the "substantive ultra vires" doctrine may be invoked to accomplish that result is the critical Federal takings question presented by this case.

That question arises because of the repudiation by respondents of their "hell or high water" commitments to make all payments necessary for the Supply System to honor the bonds regardless of the success or failure of the projects, and the unforeseeable and arbitrary nature of the decision below that those obligations were "substantively ultra vires"—meaning that the entire debt was cancelled, *nunc pro tunc*, with no obligation even to make restitution of the moneys advanced.[2]

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[1] Three Washington respondents—Franklin County PUD No. 1, Chelan County PUD No. 1 and Douglas County PUD No. 1—have filed statements urging that the petition be granted.

[2] Several respondents suggest in this Court that the decision below was essentially thrust upon them. They say they never "repudiated" their prior commitments. (Washington Public Utilities Group Opp. Br. at 22; Nine Respondents' Opp. Br. at 8; Snohomish Opp. Br. at 6.) For example, the Washington Public Utilities Group claims now that they "believed they had legal authority to enter into such agreements by which they assumed the 'dry hole risk' and have

If respondents were private—instead of public—entities, the "substantive ultra vires" defense would not have been available to them.[3] But if the respondents may avail themselves of this defense because of their governmental status, that same status gives rise to constitutional limitations on the exercise of governmental powers. Particularly is that so where the "State's self-interest is at stake". *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977).

Prior Washington decisions of long standing had taught that the doctrine of "substantive ultra vires" might be used to deny all relief only where "authority is so completely lacking [that] it seems fair to presume bad faith on the part of the private party". *E.g., Noel v. Cole*, 98 Wash. 2d 375, 381 n.3, 655 P.2d 245, 250 n.3 (1982).[4] That rule was ignored in this case. Respondents emphasize their own good faith, stressing that they initiated these projects to meet "their legal responsi-

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never contended otherwise". (Opp. Br. at 7.) But those respondents never made that statement or anything like it in the Court below; they actively sought the result they obtained, and they are obviously now seeking to preserve its benefits. It is therefore not surprising that the Court below concluded that "Respondents have repudiated . . . the participants' agreement". (Appendix A at 35.) And, also contrary to the suggestion of some of the respondents, litigation challenging the validity of the respondents' obligations was initiated by some of the respondents before Chemical filed this declaratory judgment action on behalf of the bondholders. (Petition at 9.)

[3] *See* Brief for the American Bankers Association, *et al.*, as *Amici Curiae* at 12 & n.5.

[4] Many respondents stress the rule that "private parties dealing with a government agency are charged with knowledge of the agency's authority" (citing *Noel*, 98 Wash. 2d at 379, 655 P.2d at 248). But *Noel* and other Washington cases expressly limit the legal consequences of such imputation of knowledge by requiring relief in the absence of bad faith. *See, e.g., Finch v. Matthews*, 74 Wash. 2d 161, 443 P.2d 833 (1968) (relief granted despite unlawful conveyance); *Edwards v. City of Renton*, 67 Wash. 2d 598, 409 P.2d 153 (1965) (recovery awarded on contract held invalid for lack of compliance with procurement and budget statutes); *Abrams v. City of Seattle*, 173 Wash. 495, 23 P.2d 869 (1933) (relief granted despite unauthorized lease agreement).

bility to provide needed electricity to the public".[5] And the Court below itself observed that "all parties assumed that statutory authority existed". (Appendix A at 25.) Its invalidation of the participants' agreements turned not on any blatant or notorious flaw, but rather on such elusive matters as the precise "sufficiency" of control accorded the participants. In such circumstances, the denial of any relief by the imputation of "bad faith" to bondholders constitutes a "totally arbitrary and unprincipled" ruling of the type that many respondents concede is constrained by Federal constitutional guarantees. (Washington Public Utilities Group Opp. Br. at 11.)

There is no plausible regulatory justification that might support the drastic forfeiture of private property effected in this case. Although respondents now see fit to emphasize their asserted lack of "sufficient control", they have not identified even a single act that the Supply System undertook over their objections.[6] The burdens from which respondents seek to insulate their constituents thus bear no relation to the claimed deficiency in their authority. Instead, their constituents' losses stem solely from business risks that respondents themselves concede afflicted the entire industry (*e.g.*, *id.* at 7), risks expressly assumed by the respondents and not shared by the bondholders.

Respondents also seek to defend the denial of all redress on the grounds that (1) they did not receive any of the bondholders' funds; (2) the Supply System expended those funds solely for its own purposes; and (3) respondents received no benefit from the bondholders. These often-repeated claims are without merit. They are an attempt to obscure the substance of the transaction—and therefore the basis of the constitutional claim—by the form of the projects' financing: First, as the briefs in opposition acknowledge, funds flowed

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[5] Washington Public Utilities Group Opp. Br. at 5.

[6] Nor, of course, have they shown why those participants who held 87% of the voting power on the Supply System's Board of Directors did not possess the requisite control, a factor also ignored by the Court below. (*See* petition at 25-26.)

directly to the Supply System (rather than to respondents) only because respondents themselves determined that the Supply System should be used as "the focus for financing". (Washington Public Utilities Group Opp. Br. at 6.) Second, respondents not only concede but emphasize that they initiated these projects to meet their own responsibilities to their own constituents. The Supply System had no such responsibilities; it had no individual constituents; and it had no purposes of its own, other than meeting its obligations to its members (most of whom are the Washington municipal respondents here). Finally, the bondholders plainly conferred a benefit on the respondents: they advanced $2.25 billion in outside financing that enabled respondents to pursue public projects without expending public funds.

Respondents' "substantive ultra vires" defense based on the form of the projects' financing proves far too much because it demonstrates the irrational emptiness of the confiscatory state law theory said to be immune from constitutional scrutiny. The form of the financing transaction, as respondents concede, had nothing to do with the success or failure of the projects. That same form would have applied had the projects been successful. Yet the respondents' "substantive ultra vires" rule invalidates all of their obligations retroactively from their inception. The rule therefore leaves the bondholders without recourse against the respondents no matter what happened after financing of the projects began, as the decision below plainly holds. (Appendix A at 38.)

Still, the respondents argue, the Federal Constitution cannot be implicated because, whether erroneously or not, the Washington Supreme Court approved the repudiation of their obligations. But that approval only consummated a series of actions by participants that, in combination, produced the result the Takings Clause precludes. As was true in *Armstrong v. United States*, 364 U.S. 40 (1960), a series of governmental actions causing a shift in legal relationships, although legally permissible, may place such a substantial and unforeseen

burden on private parties as to constitute a taking requiring compensation.[7]

Finally, there is no merit to respondents' suggestion that application of the Takings Clause here would necessarily effect a massive expansion of this Court's jurisdiction, constitutionalizing virtually every state law contract case. In fact, review and reversal of the decision below would reaffirm the established rule that private property may not be subjected to complete forfeiture by *ipse dixit,* without fair notice and without the justification of a plausible public purpose. *E.g., United States v. Locke,* 53 U.S.L.W. 4433, 4439 n.15 (U.S. April 2, 1985).

2. *Respondents Evade the Due Process Claims.*

Respondents do not attempt to defend the finding of the Court below that the bondholders had been "negligent" in failing to obtain a declaratory judgment regarding respondents' assurances. As set forth in the petition (at 18-19 & n.11), the Court invoked that declaratory action requirement without benefit of any argument or briefing, absent any precedential support, and despite the fact that the bondholders had no binding declaratory judgment remedy.

Respondents seek to label this error harmless by contending that the "substantive ultra vires" holding was sufficient

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[7] In *Armstrong,* a series of transactions by the United States led ultimately to the invocation of a legal defense (sovereign immunity as opposed to ultra vires) that had the effect of destroying an otherwise valuable right (a lien as opposed to a right to restitution). That shift in legal relationships was found to be permissible but to constitute a taking. Here, as there, the sudden destruction of the bondholders' expectations regarding the return of their funds "was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the [property], something that the Government could do . . . but which no private [actor] could have done. Since this [action] was for a public use, however accomplished, whether with an intent and purpose of extinguishing the [property interests] or not, the Government's action did destroy them . . . and did thereby take the property value . . . within the meaning of the Fifth Amendment". 364 U.S. at 48-49. The same conclusion should follow here.

to justify denial of all equitable relief. That simply is not so. The Washington Supreme Court both created this illusory declaratory judgment basis for its decision and attached to it independent significance, repeating it three times. (Appendix A at 25-26, 32.)[8]

Respondents also seek to defend the Court's holding—without benefit of any evidentiary proceeding—that the participants lacked "sufficient control" over their projects.[9] But respondents do not deny that the participants possessed the legal power to control the Supply System through their exercise of 87% of the voting power on its Board of Directors. Instead, they argue that the Court appropriately ignored this unquestioned legal relationship by confining its inquiry to a legal analysis within the "four corners of the agreement".

Respondents do not explain how it could be proper for the Court to limit its inquiry so narrowly as to bar any consideration

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[8] One brief on behalf of the Columbia respondents states that "in cases involving issues of major public importance" Washington courts "have dispensed with the usual requirement of an 'actual case or controversy' ". Opp. Br. at 18, citing a class of cases not relied upon by the Washington Supreme Court. Those respondents neglect to mention, however, that, under Washington law, a discretionary, advisory opinion issued in that class of cases "is not binding on the court in the future and does not determine the rights of any parties . . . ." *In re Elliott*, 74 Wash. 2d 600, 616, 446 P.2d 347, 357 (1968).

[9] It is fantastic to suggest, as do some respondents, that the Court below was straining to invent a new test for the bondholders' benefit under which authority might have been found. Because the Court was construing the Joint Operating Agency statutes (Wash. Rev. Code ch. 43.52) that were enacted to permit participants to contract precisely as they did here—*i.e., without* ownership in the sense of legal title—it was necessary to find something apart from lack of ownership to invalidate the agreements. The decision below amply illustrates the lengths to which the Court was willing to go to find an absence of authority: a result strikingly at odds with that publicly stated by all concerned before the projects failed; a result that was reached by ignoring prior decisions and legislative directions regarding municipal authority; and a result that accordingly was criticized by the three dissenting justices and all commentary. (*See* petition at 10-12 & n.6; Brief for the City of Seattle, Washington, as *Amicus Curiae* at 10-11.)

of legal relationships that should have been dispositive under the Court's own theory of authority. Nor do respondents explain what conceivable public policy might be advanced by a theory of authority that invalidates agreements for lack of "sufficient control" while ignoring contemporaneous legal relationships that establish not merely "control" but complete domination.[10]

Respondents also fail to explain where within the "four corners of the agreement" the Court could conceivably have found a basis for concluding that "the participants' committee apparently served as a rubber stamp for WPPSS' decisions". Nor do they explain how, if the Court confined itself solely to construction of the contract, it could have rested its decision on the ground that "the complexity" of "budgetary items" and "construction decisions" made it "seem unlikely" that "sufficient control" existed. These statements are not the product of contractual construction: they are findings of fact.[11] They were made without the benefit of any trial below. They were maintained despite the bondholders' repeated requests for an opportunity to present evidence. They violate the most fundamental precepts of due process and raise an important Federal question warranting issuance of the writ, as the dissent expressly urged. (Appendix A at 40-41.)

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[10] Certain respondents draw attention to the fact that some participants became members of the Supply System after the participants' agreements were signed. But even those respondents do not deny that the Washington municipal participants—the *only* participants whose authority was at issue here—dominated the Board of the Supply System at all relevant times.

[11] As set forth in the petition (at 25), this was expressly conceded by the very counsel for respondents who now contends that the Court confined its inquiry to the "four corners of the Agreement". (Washington Public Utilities Group Opp. Br. at 27.) The unfairness of these findings is further shown by the fact that they all concerned events occurring after the participants' agreements were signed —events that therefore had nothing whatever to do with the question whether the agreements were "substantively ultra vires" from the time of their inception.

3. *The Pendency of Other Litigation Provides No Basis for Denial of the Writ.*

Several respondents emphasize the pendency of related litigation and suggest it is an alternative means of relief that warrants denial of certiorari here. Respondents fail to note, however, that in those proceedings they vigorously contest the propriety of any such relief; indeed, as their attempts to distance their conduct from the Washington Supreme Court's decision in this case already indicate, they are defending those actions on the grounds that the bondholders' injuries stemmed solely from the decision of which review is sought by the petition. Accordingly, as set forth in the *amicus* brief of the National Bondholders' Committee, the additional lawsuits that respondents stress are not a meaningful or reasonable alternative to review of this central, core case. As in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436-37 (1982), "[s]eeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole". That is particularly apparent in the circumstances present here for the reasons set out in the *amicus* brief of the American Association of Retired Persons.

More generally, the respondents' refusal forthrightly to take responsibility for their own conduct illustrates the importance of this case. If this case is permitted to establish an escape route from municipal obligations undertaken in asserted good faith, how many public officials will be able in the future to acknowledge the public's responsibility for the costs associated with unpopular or failed projects? This Court should act now to eliminate the temptation toward municipal irresponsibility created, and the grave injustice perpetrated, by the decision below.

CONCLUSION

For the reasons stated herein, in the petition, and in the *amicus* briefs filed in support of the petition, this Court should issue the writ of certiorari.

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